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Readings in
AMERICAN GOVERNMENT

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PREFACE

The purpose of this volume is to bring together a number of articles and documents which are not readily available for classroom use but which are of value because they show how the government functions. Each selection has been chosen because of its vigor, its thoroughness, and the freshness of its point of attack. Most of the readings have been put to the test with a group of college sophomores and juniors in the School of Citizenship and Public Affairs, Syracuse University, who have responded to the material with more enthusiasm and interest than to the text-books. As far as possible, selections have been reprinted which show the relationship of economics, sociology, history, and psychology to the problems of government.

The book is primarily intended as supplementary reading in university and college courses. In order to facilitate its use, references to a number of well-known text-books are given at the end of each chapter. Introductory statements prefixed to each chapter are provided with the hope that they may serve as a device to secure continuity so that the work will be more usable.

No attempt has been made to cover the war powers, the activities of the Navy Department or the Departments of Agriculture, Commerce, Labor and Interior. The Editor is conscious of these and other omissions, but lack of space prevented their inclusion. The topics covered seemed to be of greater significance.

Acknowledgment is due to the generous response of editors, publishers, and authors who have permitted the reprinting of the material. The editors of the *American Political Science Review*, the *National Municipal Review*, the *Nation*, the *Outlook*, the *New Republic*, the *Century*, the *Forum*, and the *Congressional Digest* have been exceedingly courteous in extending their permissions.

The editor desires to express his appreciation to his colleagues of the School of Citizenship and Public Affairs for their advice and help in the preparation of the volume. Special acknowledgment is due to Dr. Earle H. Ketcham, who has given much time to the choice of selections and to the chapter prefaces. The Editor assumes all responsibility for the material as presented.

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READINGS IN AMERICAN GOVERNMENT

INTRODUCTION

THE IMPORTANCE OF THE STUDY OF GOVERNMENT

THE PRESENT STATE OF THE STUDY OF POLITICS[1]

By Charles E. Merriam

The original plan of this paper included a general survey and critique of the leading tendencies in the study of politics during the last thirty or forty years. It was intended to compare the methods and results of the various types of political thought—to pass in review the historical school, the juridical school, the students of comparative government, the philosophers as such, the attitude of the economist, the contributions made by the geographer and the ethnologist, the work of the statisticians, and finally to deal with the psychological, the sociological, the biological interpretations of the political process.

It would have been an interesting and perhaps a useful task to compare the scope and method of such thinkers as Jellinek, Gierke, Duguit, Dicey and Pound; the philosophies of Sorel and Dewey, of Ritchie and Russell, of Nietzsche and Tolstoi; to review the methods of Durkheim and Simmel, of Ward and Giddings and Small; of Cooley and Ross; and to discuss the developments seen in the writings of Wallas and Cole.

It would have been useful possibly to extend the analysis to the outstanding features of the environment in which these ideas have flourished, and to their numerous and intimate relations and interrelations. It might have been possible to discuss the influence of social and industrial development, of class movements and struggles, or of group conflicts in the larger sense; to examine the influence of urbanism and industrialism; of capitalism, socialism and syndicalism; of militarism, pacificism, feminism, nationalism. It would perhaps have been useful to offer a critique of the methods and results portrayed; to make a specific appraisal of the value of the logical, the psy-

[1] Reprinted from the *American Political Science Review,* May, 1921, by permission of the editor.

chological, the sociological, the legal and the philosophical and the historical methodologies and their respective contributions to the study of the political.

This task was abandoned, however, and reserved for another occasion, as it became evident that no such survey could be condensed within reasonable limits. It seemed that our common purpose might be better served by a different type of analysis, aiming at the reconstruction of the methods of political study, and the attainment of larger results alike in the theoretical and the practical fields.

Within relatively recent times the theory of politics has come in contact with forces which must in time modify its procedure in a very material way. The comparatively recent doctrine that political ideas and systems—as well as other social ideas and systems—are the by-products of environment, whether this is stated in the form of economic determinism or of social environment, constitutes a challenge to all systems of thought. It can be ignored only under the penalty of losing the locus standi of a science. Systems may justify themselves as sounding boards of their time, but what becomes of the validity of the underlying principles usually announced with dogmatic and authoritarian emphasis?

Again, in our day the measuring scales of facts and forces have been made much finer and more exact than ever before in the history of the race. The measuring and comparing and standardizing process goes on its way, impelled by the hands of thousands of patient investigators who pursue the truth through the mazes of measurable and comparable facts. To what extent has this increased accuracy of measurement and facility in comparison of standardized observation found its way into the field of the political?

Further, on the borders of politics there have appeared in our day many allied disciplines of kindred stock. Statistics and psychology, biology, geography, ethnology and sociology have all developed and continued to produce masses of material facts, of interpretations and insights, correlations and conclusions, often bearing, directly or indirectly, upon the understanding of the political process. We may appropriately raise the question, to what extent has politics availed itself of the researches and results of these new companions in the great search for the understanding of the phenomena of human life?

Certain suggestions as to ways and means by which the technical and professional study of politics may be improved in quality and serviceability are worth some discussion. There is the question of a mechanism for the collection and classification of political material. In many ways politics has been outstripped in the race

for modern equipment supplying the rapid, comprehensive and systematic assembly and analysis of pertinent facts. For business reasons the collection of certain limited classes of legal data has been systematized, and the results are promptly placed before every student of the law. For business reasons certain types of industrial data are now collected in great quantities for the use of the business man. Some of the same work is done by various bureaus of the governments. Yet in the main the political machinery is still sadly defective. The best equipped research man in the best equipped institution of learning hardly has machinery comparable with that of the best lawyer in his office, or of the best engineer, or the expert of the large corporation, or the secretary of the chamber of commerce, or the research department of the Amalgamated Clothiers. The truth is that he often has no laboratory equipment at all, and curiously enough in these days of large scale organization, he labors single-handed, even when he discusses this characteristic feature of our civilization. In this respect the political and social sciences have been generally outstripped by the so-called "natural" sciences—now often dropping the "natural"—which are far better supplied with the personnel and facilities for research.

On a larger than individual scale, there is a lack of prompt and adequate collections of great classes of laws, orders and rules. The admirable collection of the New York State Library has been discontinued and the gap never filled. The same thing is true of municipal ordinances, collections of administrative regulations, and judicial data except for reported cases. On an international scale the field is scarcely touched. It is not to be expected that political data for scientific purposes should be as quickly gathered as crop reports or legal decisions, but need the data be as scantily and infrequently reported as is now the case?

Further, the reasonably complete and prompt collection of material regarding the practical working of political institutions is largely unorganized and only spasmodically assembled, often by propaganda agencies rather than by scientific bodies. How, for example, is material made available at present regarding the workings of the system of proportional representation, or the city manager plan of government? Chiefly by the haphazard, irregular and unsatisfactory process of observation and compilation by inadequately equipped individual workers. There is neither fund nor personnel available for extended surveys of many important fields regarding which politics should speak with some authority.

Only through the organized and persistent effort of many scholars can this defective situation be made a satisfactory one. With the

coöperation of the various governmental agencies, of the several institutions of learning, and perhaps of private research funds, the workers in political science may be placed on a basis where necessary data and assistance will be available for technical use. But until then we limp where we might run.

It is not impossible that political prudence might be more effectively organized than at present. By political prudence is meant the conclusions of experience and reflection regarding the problems of the state. This constitutes a body of knowledge which, though not demonstrably and technically exact, is nevertheless a precious asset of the race. Of course it is not meant to suggest that all of this prudence is found with the professional students of politics—God forbid—but the initiative in the scientific assembly and analysis of this material may fairly be said to be one of our tasks. Certainly this falls within no other domain. It seems desirable that this mass of information, analysis, conclusion, tentative and dogmatic, accumulated by the professional students of politics should be more fully known than at present. All other groups, professional and otherwise—and there are many new ones in the last generation—express their views upon all manner of questions of state; why not the student of politics who is usually most nearly disinterested in his point of view, more comprehensive in his investigation, and impartial in his conclusions?

What is the judgment of the world's students of politics upon such problems as proportional representation, "the" or "a" League of Nations, freedom of speech under twentieth-century conditions, public ownership of public utilities—these only by way of suggestion? In many instances the counsels of professional students of politics, or of political prudence, would be divided, particularly when class, racial or nationalistic issues were raised, but in many other instances they would be united. Even their divisions would presumably rest upon at least superficially scientific grounds, and would help to turn the organization of opinion upon carefully investigated facts and careful reasoning, rather than upon group interests awkwardly disguised in ill-fitting garb. But if professional students of politics cannot come together to discuss even the fundamentals of political prudence because of the fear of violent disagreement, should not that circumstance itself cause sober reflection as to their fundamental preconceptions; and might it not suggest remodelling and reorganization of their methods? Might it not point to the weak spot in their procedure and in time lead to its strengthening?

That professional students of politics should upon all occasions and upon every transient issue rush to announce their theories and

conclusions with an air of finality, is certainly not to be desired. But upon grave questions of long standing, where exhaustive inquiries have been made and all phases of a problem maturely considered, the professional opinion of special students has a certain value. Further, if students were equipped with resources for exhaustive researches through expert commissions on occasional topics, such documented inquiries and the deliberate findings based upon them might prove to be of very great use. Practical experience and observation do not lead to the conclusion that electorates or parliamentary bodies or administrative agencies are waiting breathlessly for the pronouncements of political science associations; but on the other hand the same experience and observation do suggest that they would on many occasions welcome the very sort of information, analysis and tentative conclusions of political prudence that serious professional organizations of this type could supply.

The broader the base of such a professional organization, the more effective it should be. An organization of many cities would be better than one, of many states than one, of many nations than one. For in the larger unit there is an opportunity for the elimination of the local, the class, the racial propagandas that have historically played so large a part in the formation of political theory.

Finally the methods of politics, as of social science in general, are constantly in need of scrutiny and revision in order to avoid falling into a category that is neither scientific science nor practical politics. Of the extent to which political theory has been conscripted in the service of class and race and group we have been admirably informed by Professor Dunning. A much earlier writer says:

> In law what plea so tainted and corrupt
> But, being seasoned with a gracious voice
> Obscures the show of evil? In religion
> What damned error, but some sober brow
> Will bless it and approve it with a text,
> Hiding the grossness with fair ornament?

But that day perhaps is passing. The average man now possesses an acid test for the authoritarian doctrines which in some earlier ages he would not have been permitted to discuss, or more probably would not have thought of discussing. He begins to realize that in the excitement of racial or religious or class struggle, political theory is likely to become a pawn or piece in the larger game of military, pecuniary, or other group advantage. So it happens that we live in a time when social contrivances and control are employed more than ever before in systematic fashion, but also in a time when authority

is challenged as never before. At a time when political regulation is most comprehensive, political obligation is least firmly rooted.

Sociology and social psychology offer material of the greatest value. Geography, ethnology and biology present facts and conclusions indispensable to a correct understanding of the political process, which tend to make the knowledge of that process less closely dependent upon authoritarian propaganda, and nearer the domain of scientific technology.

Statistics increase the length and breadth of the observer's range, giving him myriad eyes and making it possible to explore areas hitherto only vaguely described and charted. In a way, statistics may be said to socialize observation. It places a great piece of apparatus at the disposal of the inquirer—apparatus as important and useful to him, if properly employed, as the telescope, the microscope and the spectroscope in other fields of human investigation. But whether politics has made full use of this new instrument of inquiry may be questioned.

In the narrower sense, there are standard fields where political statistics are almost completely lacking. Notable examples in this country are our judicial and criminal statistics. In the field of operative statistics, measuring services on standardized bases, little has been done. It is a legitimate function of the political scientist to aid in the development of statistical schedules, to ask for additional information which can be developed only in this way. In the larger sense, we have not yet surveyed the possibilities of statistical observation, and fitted it to the growth of the study of politics.

Statistics, to be sure, like logic, can be made to prove anything. Yet the constant recourse to the statistical basis of argument has a restraining effect upon literary or logical exuberance; and tends distinctly toward scientific treatment and demonstrable conclusions. The practice of measurement, comparison, standardization of material—even though sometimes overdone—has the effect of sobering the discussion. We do not look forward, it is true, to a science of politics or of economics or of sociology based wholly and exclusively upon statistical methods and conclusions. We know that statistics do not contain all the elements necessary to sustain scientific life; but is it not reasonable to expect a much greater use of this elaborate instrument of social observation in the future than at present? Is it unreasonable to expect that statistics will throw much clearer light on the political and social structure and processes than we now have at our command?

Modern psychology also offers material and methods of great value to politics, and possibilities of still greater things. The states-

men and the politicians have always been psychologists by rule of thumb, and the political scientist and the economist have often tried to apply such psychology as their time afforded. The "natural" man of the *Naturrecht* school and of the classical political economy was described in the light of such information as the psychology of the day afforded. But undoubtedly Thorndike and others can tell us more about the *genus homo* than was given to Thomas Hobbes and Adam Smith. Even the psychologists—if we may accept the statements of some of them—have not always been strictly psychological in their method. The field wherein the physiologist and the behaviorist and the neurologist and the psycho-analyst and the biologist and the psycho-biologist are still busy evolving a method is a domain not yet reduced to constitutional order and government. But these new inquiries seem likely to evolve methods by which many human reactions, hitherto only roughly estimated, may be much more accurately observed, measured and compared.

They are likely to assist in the evolution of methods and means by which new relations will be discovered, new modes of adaptation contrived, and the processes of social and political control substantially modified. They are already suggesting methods by which much more accurate measurement of the human personality may be made, and much deeper insight into the social process be secured. Their work is likely to be supplemented by that of group psychology; and somewhere along the line there may be developed the study of the political personality and process, and the aspects and bearings of political psychology, which has long existed in name and in practical fact, but not in systematized form. We seem to stand on the verge of definite measurement of elusive elements in human nature hitherto evading understanding and control by scientific methods. In certain fields, such as those of education and medicine, the lines have already been thrust far out into the realm of what had always been charted as the Great Unknown. Psychology, of course, like statistics does not assume to set up the standards of social science, but is an instrument or method by which students in these fields may be materially assisted.

It is not impossible that we may have, in addition to the broad observational study of unstandardizable forces and tendencies, playing so large a part in political prudence, a more basic study of measurable and comparable political reactions of their strength and limitations, of their possibilities of adaptation and constructive organization. This more intensive study may help to solve: (1) the problems of preliminary political education, (2) of public education in the larger sense of the term, (3) of local political coördination and organization,

and (4) of scientific technology. The statistical use of psychological material offers to the student of politics large areas hitherto unexplored, and insight into springs of political action up to this time only imperfectly observed.

From time to time the study of politics has been completely abreast with the current science of the time, as in the days of Aristotle, and from time to time has drifted away again into scholasticism and legalism of the narrowest type. Writers like Wolff and Thomasius, Suarez and Pufendorf, Woolsey and Sidgwick, have left us great monuments of industry and erudition. They, like many others, were of great value in the general rationalizing process of the time, but were sterile in the production of living theories and principles of political action. In our day the cross fertilization of politics with science, so called, or more strictly with modern methods of inquiry and investigation, might not be unprofitable.

In the study of international law, for example, may we not go behind treaties and conventions into a deeper study—not only of what are commonly called social and political forces, into differences of environment, language and culture—but also into a systematic examination of race and group loyalties and aversions, their genesis, strength, their modes of adaptation and organization? Instinctively the stranger is the enemy. But what has modern political science to say about the nature of reorganization of it? What have the world's students of politics and kindred sciences to say upon this problem, the solution of which bears so closely upon world organization and world peace?

We have studied the urban problem in terms of "good" and "bad" government, of boss rule and reform, of innumerable mechanisms and contrivances ingeniously devised, but is it not possible to go more deeply into the basis of the city, scrutinize more accurately the social and political process of which the political is an integral part? Are the forces producing municipal misrule inherently recalcitrant and insuperably unruly, or do we not fully understand the political reactions in the given environment, and how they may best be educated and constructively adapted to modes of life under the forms of the cooperative enterprise of democracy?

In the study of public administration may we not add to the study of rules and laws and forms of procedure and control some deeper insight into the underlying factors affecting and conditioning personnel and organization and operation of large groups of men? Will not the methods of statistics and psychology be of service to us in the prosecution of such inquiries?

In short, may we not intensify our study of the political man, the political personality, of his genesis, environment, reactions, modes of adaptation and training, and the groups of which he is a part, and of the complicated political process, to a point where the preconceptions of politics will be given a far more definite fact basis, and practical prudence a far surer touch in its dealing with the problems of state?

We may be reminded of the weird anthropology in the politics of Bodin and Montesquieu, or of Bluntschli's fearfully and wonderfully made "political psychology," in which he compared sixteen selected parts of the human body with the same number of organs of the body politic, or of the ambitious but abortive social physics of Comte, or of the array of organismic theories which Dr. Coker has so comprehensively catalogued—all these to point the danger of advancing beyond the line of strictly authoritarian or tendential and prudential politics. But on the other hand we may point to many penetrating studies in social and political organization. We may call attention to the surprising practical advances made by criminology and penology, and to the daily practical applications in social and industrial relations of information and methods drawn from the newer disciplines.

Must we conclude that it is possible to interpret and explain and measurably control the so-called natural forces—outside of man—but not the forces of human nature? Or have we overdone "nature" and underdone "man" scientifically? Is there some fundamental line of division between the cultural, the humanitarian, the scholarly, the "learned," on the one hand, and the scientific (in quotation marks) on the other, so that their methods must be fundamentally different? Perhaps it is so.

It is now nearly thirty years since the great naturalist Le Conte pointed out that art comes first, then science; then science like a daughter helps the mother. Hitherto, said he, "Social art has advanced in a blind staggering way, feeling its way in the dark, retrieving its errors, recovering its fall." But this cannot longer be. He continues: "Science must be introduced into politics only as suggesting, counselling, modifying, not yet as directing and controlling." Science "ought to be strictly subordinate to a wise empiricism. She must whisper suggestions rather than utter commands." [1]

For our purposes it is not necessary or possible to read the future of social or political science. It is sufficient to say that we may definitely and measurably advance the comprehensiveness that the

[1] In Brooklyn Ethical Association, (*Man and the State*), pp. 351–353.

processes of social and political control may be found to be much more susceptible to human adaptation and reorganization than they now are.

Here we are confronted, however, as at other points by the urgent practical necessity for better organization of our own professional research. It would be possible, both nationally and internationally, to coördinate much more closely the scattered undertakings in charge often of isolated observers and workers. The political research of our nation and of others is ill organized, especially for a branch of knowledge that deals with organization and administration as one of its central topics. As a result, even though the available forces are small, there is some duplication of effort. There are large gaps left where there is no investigation made, and there is general lack of organized effort to break through the lines of political ignorance and prejudice. We lack comprehensive and forward looking plans, following which we might advance by measurable stages in certain directions at least. If the mortality among students of politics is high because of the ravages of university administration and politics, there is all the more reason for husbanding carefully our resources, and making the most effective use of them. And if the endowment of political research is more difficult because it must compete with other subjects touching less closely, or seeming to, the nerves of the social and political order, there is all the more reason for explicit statement of definite plans and for continued pursuit of the means to carry them out under public or private auspices;

These suggestions are offered in conclusion:

1. More adequate equipment for collection and analysis of political material;

2. More adequate organization of the political prudence of our profession;

3. The broader use of the instruments of social observation in statistics, and of the analytical technique and results of psychology; and closer regard to and relations with the disciplines of geography, ethnology, biology, sociology, and social psychology.

4. More adequate organization of our technical research, and its coördination with other and closely allied fields of inquiry.

Quite properly a bill of particulars might be called for, but this paper is only in the nature of a declaration, and specific statements are the next step in the case. What has been said is wholly vain unless it has been understood to emphasize above everything else the crying need for organization and coordination of effort both in general method and with specific reference to the activities of our professional societies.

Science is a great coöperative enterprise in which many intelligences must labor together. There must always be wide scope for the spontaneous and unregimented activity of the individual, but the success of the expedition is conditioned upon some general plan of organization. Least of all can there be anarchy in social science, or chaos in the theory of political order.

Beard, (4th Ed.), pp. 3–38.
Ogg and Ray, (2nd Ed.), pp. 3–8.

I

THE COLONIAL BACKGROUND

The colonial and revolutionary background of the American Government is significant in its relation to present-day problems in that the same motives actuated our forefathers as direct our political thinking of today. Racial and religious prejudices, economic conflicts, and class distinctions were present, while at the same time philosophical notions of government were current. We have overestimated the influence of English political theory and have failed to recognize these more realistic influences. Obviously, in order to appreciate the setting of the American Revolution and to grasp its true significance, we must understand these.

One of the best illustrations of these motives may be found in New York. When the colony broke with the mother country, the backwoodsmen had organized themselves into units based on a notion of democracy, which they interpreted as universal male suffrage. This idea was put into practice until the Constitutional Convention of 1777 gave the power of government to the aristocratic group, which meant "the few, the rich, and the well-born." They controlled New York politically until 1819, when the suffrage was extended; but even then the rise of the political party eliminated any opportunity for democracy which might have existed.

I. THE NEW WORLD, AN EXPERIMENT IN DEMOCRACY[1]

By Carl Becker

The American Revolution was thus primarily a struggle between the Colonies and Great Britain over the question of self-government—a struggle which was bound up with the question of royal as against parliamentary government in England, of popular government against a possible autocracy. But there was also another phase of the Revolution, and that was the struggle within the Colonies themselves between

[1] Reprinted from *The United States, An Experiment in Democracy,* Harper and Brothers, New York, 1920, by permission of the author and publishers.

the little commercial and landowning aristocracies that had hitherto governed the Colonies and the "people," the unfranchised "humble folk," who now were coming to demand a measure of political equality. This struggle runs throughout the period of the controversy with Great Britain from 1765 to 1776; and while it was somewhat diminished during the period of the war itself, it broke out again with renewed force after the war was over. In fact, the American Revolution was not only a movement for national independence from Great Britain; it was also a movement for the democratization of American society and politics—a movement which has continued from that day to this and which is the central theme of our history.

In 1765 the right of voting in the American Colonies for members of the colonial assemblies was in general restricted to those who possessed property, or met certain educational or religious tests. In most colonies a majority, and in all a considerable minority, of the adult male citizens were disfranchised. Besides, the methods of naming candidates and of voting were such as to place a determining influence in the hands of a small coterie of wealthy families—the so-called "best families" of the province. These best families, together with the governors, who were mostly appointed from England and frequently from among these very families, made a very distinctive and powerful upper class—a well-intrenched aristocracy which was the real governing force in each colony. In Virginia and South Carolina this class was composed of the great tidewater planters, whose extensive fields of tobacco, rice, and indigo were cultivated by means of negro slaves. In the Middle colonies there were not only the great landowners, whose estates were cultivated mainly by tenant labor, but also the wealthy commercial families of the cities of New York and Philadelphia. In New England there were fewer great estates and the small freeholders were more numerous; but there also a political and social aristocracy had come into existence—descendants of the old official and clerical leaders closely allied with families that had gained prominence in law or commerce.

Sharply distinguished from these "gentlefolk," in dress and manners as well as in social and political influence, was the great mass of the population—artisans and laborers, tenant and small freehold farmers. In the Middle and Southern colonies this distinction had come to have a territorial as well as a social and economic basis. In Virginia the poorer classes had moved "west" beyond the first falls of the rivers, into the piedmont or "up-country," where land was plentiful and cheap; while in Pennsylvania German and Scotch-Irish immigrants in great numbers had settled in the interior counties and from there had followed the valleys southward into the Virginia and

Maryland up-country and even as far south as the Carolinas. In this back-country the soil was not adapted to tobacco or rice. Here there were no great estates, no slaves, and few "servants," no houses with pretensions to architectural excellence, no leisured class with opportunities or inclinations for acquiring the manners or the tastes of the "gentleman." Here every man earned his bread by the sweat of his brow, manners were rude and primitive, institutions were simple, men lived close to the soil, equality was a fact, and freedom was limited only by the stubborn resistance of nature.

The conflict between the interests and ideals of these two classes and these two regions was already beginning when the controversy between the British government and the Colonies began; and from the first the two issues became more or less identified. This was strikingly the case in Virginia in respect to the resolutions to be adopted in protest against the Stamp Act. In the session of the House of Burgesses of 1765 the old leaders of the tidewater region, who had always managed the colony, were opposed to adopting any resolutions at that time, since they had already, in 1764, drawn up a mild protest against the passage of the act. But there was present at this session the famous orator and tribune of the people, Patrick Henry, who had recently made a name for himself by exposing the shady actions of the treasurer, John Robinson, a prominent member of the aristocracy. This was equivalent to challenging the supremacy of the little group of tidewater planters, who had come to look upon the management of the colony as their vested duty. The episode had given Patrick Henry a great name in the province, and had got him a considerable following among the young men and small planters throughout the province, and especially in the back-country where he was born and raised and which he represented. In the session of 1765 Henry took the lead against the conservatives in introducing and passing a set of resolutions which protested much more vigorously against the Stamp Act than the old leaders desired.

The episode was afterward described by Thomas Jefferson, at that time a young law student, who watched with interest the doings of the Virginia House of Burgesses.

Mr. Henry moved and Mr. Johnston seconded these resolutions successively. They were opposed by Messrs. Randolph, Bland, Pendleton, Wythe, and all the old members, whose influence in the House had, till then, been unbroken. They did it, not from any question of our rights, but on the ground that the same sentiments had been, at their preceding session, expressed in a more conciliatory form, to which the answers were not yet received. But torrents

of sublime eloquence from Henry, backed by the solid reasoning of Johnston, prevailed. The last, however, and strongest resolution was carried but by a single vote. The debate on it was most bloody. I was then but a student, and stood at the door of communication between the House and the lobby; . . . and I well remember that, after the members on the division were told and declared from the chair, Peyton Randolph came out at the door where I was standing, and said, as he entered the lobby, "By God! I would have given five hundred guineas for a single vote."

This was only the beginning of a long struggle between the old leaders, endeavoring to maintain their social and political predominance in the province, and the young radicals, backed by the people of the back-country, of whom Patrick Henry and Thomas Jefferson and Richard Henry Lee were the leaders. In every stage of the conflict with Great Britain the old leaders showed themselves more cautious and conservative, the radicals more vigorous and uncompromising, in asserting the rights of the Colonies and in advocating measures of resistance. But the difference between the two parties went deeper. The radicals wanted to democratize the social and political institutions of Virginia, while the old leaders wanted to maintain their supremacy; and when the breach with England finally came and a new constitution had to be formed, Jefferson and his associates attempted to make the new constitution strictly democratic, with universal manhood suffrage, the abolition of entail in land and of primogeniture, and the disestablishment of the Anglican Church. Jefferson even went so far as to talk of the abolition of slavery. The democrats in Virginia were not able to get everything they wanted; but they accomplished much. They not only pushed the old aristocracy into the Revolutionary War, but they established a far more democratic government in Virginia than the old leaders of the colony would have established if it had been left to them. It was the declaration of rights prefixed to this constitution that was translated and circulated in France, and that became in some degree a model for the famous French *Declaration of the Rights of Man and the Citizen.*

Very similar was the conflict in Pennsylvania between the Scotch-Irish and Germans of the interior and the Quaker-merchant aristocracy of Philadelphia. The people in the frontier counties complained that the apportionment of representatives, the money system, and the organization of the courts of justice were all devised to benefit the Quakers and merchants and to perpetuate their power. "We apprehend," so runs a petition from the German and Scotch-Irish counties of the interior, "that as freemen and English subjects

we have an indisputable title to the same privileges and immunities with his Majesty's other subjects who reside in the counties of Philadelphia, Chester, and Bucks." The Scotch-Irish and Germans of the interior counties, together with the mechanics and artisans of Philadelphia, made the strength of the radical party. The frontier counties in Pennsylvania, like the frontier counties in Virginia, were strong partizans of the struggle against England, partly because they had no reason to like England, but partly because they felt that the argument in favor of the rights of the Colonies against England could be used equally in support of their own rights against the privileges of the merchants and Quakers in Pennsylvania. In 1775–76, when the first constitution of Pennsylvania was established, the essential issue was between the Scotch-Irish radicals, who wanted a strictly democratic constitution, and the eastern men, who wished so far as possible to preserve their own supremacy.

Nowhere was this conflict between the popular and the aristocratic classes more marked than in Massachusetts. The most influential man in Massachusetts at that time was Thomas Hutchinson, whose family had been prominent in Boston since the founding of the colony. He was a man of excellent education and of great ability, and in 1771, at the age of sixty, had held nearly every elective and appointive office in the province. He was also a man of wealth and related to most of the influential families of wealth in Massachusetts—the most prominent member of the Boston "aristocracy" which had long governed the Old Bay Colony.

In sharp contrast to Mr. Hutchinson were two men who became famous leaders in the Revolution—Samuel and John Adams. In 1765 Samuel Adams was a middle-aged man who had lost a fair patrimony, and who was barely able to support his family. John Adams was a young lawyer, just coming into prominence; but he felt very keenly, as his interesting *Diary* enables us to see, that he had not a fair and equal opportunity in life because social opportunity and political power had come to be so largely monopolized by the small group of wealthy and closely interrelated families of which that of Thomas Hutchinson was the chief. And throughout the struggles with Great Britain, in which John Adams took a leading part, it is clear that in his mind the people of Massachusetts were endeavoring to emancipate themselves, not only from the autocratic control of the English government, but also from the domination of a Boston aristocracy; his animosity toward Thomas Hutchinson was much greater than toward King George or Lord North.

The way in which these two issues were often united is well illustrated in connection with the famous Stamp Act controversy.

The Stamp Act required, among other things, that practically all legal documents should be executed on stamped papers. Almost every one in the colony, including Mr. Hutchinson, was opposed to the Stamp Act; but the Stamp Act could be resisted in one or two ways—one legal and the other illegal. The legal way to resist it was not to execute any document which required the use of the stamped papers; the illegal way was to go on executing documents just as if no Stamp Act existed. Thomas Hutchinson, and most-men of wealth and position in the colony, preferred to resist the Stamp Act in the legal way, and they therefore adjourned the courts of law from time to time. This method appealed to conservative men, whose incomes were assured, who were not much affected by a temporary cessation of business, and who wished not to compromise their position by any action that could be called illegal. But rising young lawyers like John Adams found that if the courts closed their fees were cut off and their position at once became precarious. The closing of the courts, John Adams wrote in his *Diary,* "will make a great chasm in my affairs, if it does not reduce me to distress." And in another place he says that he was just at the point of winning a competence and a reputation "when this execrable Stamp Act came for my ruin and that of my country."

This naïve statement reveals one of the reasons—not the only reason, but one of the reasons—why John Adams, and all those depended on fees and wages for a living, those whose interest it was to have business in a flourishing condition, were in favor of the more radical method, the illegal method, of resisting the Stamp Act, while men of wealth who lived on their incomes could afford to adopt the more cautious and conservative method. And thus it happened that John Adams came to think Thomas Hutchinson as much an enemy of colonial rights as Mr. Grenville. He convinced himself that Mr. Hutchinson and his wealthy friends, while professing to oppose the Stamp Act, were really tools of the British government and were trying in this indirect way to force the people to submit to the Stamp Act. He reasoned that the Boston aristocracy was able to maintain its privileged position in Massachusetts only because it was backed by the British government; and thus the struggle against parliamentary taxation came to be identified with the struggle against a privileged class in the colony.

It is this aspect of the Revolution that gives it its chief significance for modern democracy. The privileged classes in the Colonies, generally speaking, never really desired separation from Great Britain. They took old England as their ideal. Outside of New England most educated men were educated in England, and wished for

nothing better than to fashion their clothes, their houses, their minds, and their manners on the best English models. They opposed parliamentary taxation because they wanted to manage their own affairs in miniature parliaments, where they could carry on miniature contests with the governors for the control of the purse, after the manner of the English Parliament in the seventeenth century. In no sense were they democrats; and they were as much afraid of radical movements in the Colonies as they were of British oppression. They wanted to preserve their *liberties* against parliament, without sharing their *privileges* with the people in the Colonies. They wanted home rule, but they wanted to rule at home. Left to themselves, the governing classes in America would never have carried the contest to the point of rebellion, would never have created an independent state.

The opposition to this ideal gradually transformed the Revolution into a social as well as a political movement. Men of true democratic feeling came to see that the mere maintenance of what were called English liberties would leave things much as they were, even if the Colonies should separate from Great Britain. They wanted not simply an independent state, but a new kind of state. They were aiming at something more than could be justified by an appeal to the customary rights of Englishmen. Whether the customary rights of Englishmen supported the contention of the Colonies or the contentions of the king depended upon fine points in law and history. But it was a question that could be ably argued on both sides. In any case, there was nothing in the customary rights of Englishmen that could be used in support of equal rights for all, poor and rich alike. And so, step by step, the radical leaders broadened out their political theory, and came finally to rest their cause not merely on the positive and prescriptive rights of Englishmen, but upon the natural and universal rights of man as well.

As the Revolution ceased to be a mere contest for the rights of Englishmen and took on the character of a contest for the rights of man, it acquired an idealistic and semi-mystical quality and gathered to itself, as all such movements do, the emotional force of a religious conviction. Mr. Lecky says that the American Revolution was essentially sordid, being concerned fundamentally with a mere money dispute. There was much that was sordid in the motives and the actions of many men who took part in the Revolutionary War, but nothing could be more profoundly wrong than to regard the principal leaders as inspired by no higher motive than that of safe-guarding their property. The conflict with Great Britain began as a money dispute; but in the end it came to be transfigured, in the minds of

the American patriots, into one of the great epic conflicts of the world. We have ourselves lived through such a transfiguration; The Great War began as a conflict for land and trade, but it speedily took on, in the minds of the people concerned, the aspect of a titanic struggle between the powers of light and of darkness, a struggle which men fondly, if vainly, hoped would bring in a new international order based upon the principles of justice and humanity. So it was with the American Revolution. American patriots came to think of themselves as hazarding their lives and their fortunes for the sake of a new social order, the ideal society founded upon the enduring principles of liberty, equality, and fraternity.

There is a striking similarity between the ideals and the language of the American patriots and the radical leaders of the French Revolution. They speak with the same lyrical enthusiasm, like men who are defending and propagating a new religion. "It is impossible," writes Richard Henry Lee, "that vice can so triumph over virtue as that the slaves of Tyranny should succeed against the brave and generous asserters of Liberty and the just rights of humanity." Consider the dry common sense with which Doctor Johnson disposed of the alleged tyranny of Great Britain: "But I say, if the rascals are so prosperous, oppression has agreed with them, or there has been no oppression"; and contrast this with the reverent solemnity with which John Adams speaks of his associates as belonging to "that mighty line of heroes and confessors and martyrs who since the beginning of history have done battle for the dignity of and happiness of human nature against the leagued assailants of both."

John Adams was one of the most hardheaded of the radical leaders, no unbalanced visionary dreaming fantastic dreams, and yet John Adams, in 1775, clearly thought of himself as engaged in a great epoch-making event, far transcending any mere rupture of the British Empire or the establishment of an independent state. This is how he thinks of the meaning of the Revolution:

The form of government which you admire when its principles are pure is admirable; indeed, it is productive of everything which is great and excellent among men. But its principles are as easily destroyed as human nature is corrupted. Such a government is only to be supported by pure religion or austere morals. Public virtue cannot exist in a nation without private, and public virtue is the only foundation of republics. There must be a positive passion for the public good, the public interest, honor, power, and glory established in the minds of the people, or there can be no republican government, or any real liberty, and this public passion must be

superior to all private passions. . . . Is there in the world a nation which deserves this character? There have been several, but they are no more. Our dear Americans perhaps have as much of it as any nation now existing, and New England perhaps has more than the rest of America. But I have seen all along my life such selfishness and littleness even in New England that I sometimes tremble to think that, although we are engaged in the best cause that ever employed the human heart, yet the prospect of success is doubtful not for want of power or of wisdom, but of virtue.

In no unreal sense John Adams and his associates thought of themselves as undertaking something new in the history of the world; they were undertaking the novel experiment of founding that ideal community, a republic founded upon virtue and devoted to the regeneration of the human race.

2. THEORY OF REVOLUTIONARY PERIOD[1]

By Charles E. Merriam

More light on the political idea of the "Fathers" is given by a further study of the extension and application of the doctrines already considered. The fundamentals of the revolutionary theory were almost altogether reproductions of the English political philosophy of the preceding century, but the founders of the Republic did not halt at the point reached by their fore-fathers. They advanced the line of democratic theory and practice in accordance with the more democratic conditions. The English movement of the seventeenth century culminated in the establishment of a constitutional monarchy; the American movement went far beyond this in a democratic direction. To these changes our attention will now be directed.

In the construction of state constitutions, the monarchic and many of the aristocratic elements found in the British constitution were omitted. The frame of government became more democratic in nature. Privileged aristocracy had never been able to obtain a foothold in the colonies, and 1776 was no time to gain one. Monarchy was indentified with George III and the English system of administration, and consequently no place was made for such a governmental feature.

Many expressions of dislike for special privilege and hereditary

[1] Reprinted from *American Political Theories,* Macmillan Company, New York, 1915, by permission of the author and publishers.

ranks are found in the first constitutions adopted in the states, and no stronger evidence as to the nature of the prevailing sentiment could be given than is offered by these early declarations. Massachusetts, for example, asserted that government is instituted for the common good and happiness of the whole people;—"not for the profit, honor or private interest of any one man, family or class of men." Virginia declared that "no man or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services: which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary."

The democratic environment had rendered special privilege unwelcome, and the legislators were anxious to give the prevailing sentiment constitutional recognition. There still remained a controlling class of gentry, but they possessed no hereditary title, office, or privilege. There had never been anything more than a theory of nobility in America; with the Revolution, even this was swept away and the overwhelming sentiment declared against the institution.[2]

In the formation of state governments, the doctrine of delegated powers was everywhere prevalent. Assuming that the people were, originally, and continued to be the only source of political power, it follows that all governmental authority is only delegated by the people and is held in trust for them. Governmental authority has no inherent force in itself; it is not the creator, but the creature; it is not the master, nor even the partner of the people, but their agent or servant; it acts in the name of and in behalf of some one else and not for itself. Not only is government the servant of the people, but it is an untrustworthy and unreliable servant. It cannot be given a free hand in caring for the affairs of its master, on the contrary, it must be limited in many ways; it must be checked at every possible point; it must be at all times under suspicion. Otherwise it will cease to be servant and take the place of the master. Too much emphasis cannot well be laid upon the fear which the "Fathers" had of government. To them the great lesson of history was, that government always tends to become oppressive, and that it is the greatest foe of individual liberty.

To the end that government may be properly held in check, the "Fathers" developed an elaborate system which it was thought would adequately safeguard the rights of the people. In the first place, government should not be granted much power; in the next place, such powers as were given should be balanced and played against each other; and finally even these powers should be held for short

[2] Ga., N. C., S. C., Penn., declared against the entailment of estates.

terms only. By these means it was thought that political authority might be kept close to the people from whom it emanates, and by whose grace it stands.

More specifically, it was an opinion of Revolutionary times that government should not be too strongly organized, lest its strength be turned against the people. Hence a large military force was always under suspicion. A standing army was looked upon as a constant temptation to the ruler and a perpetual menace to the citizen. It was necessary for the government to have at its disposal a certain amount of military strength, but this should be kept within strict limits, and in subordination to the civil power. Again, every kind of centralized government was steadily opposed. It was believed that liberty was safer in the care of the local communities, where it could be kept under the eye of the people, and any attempt at usurpation be instantly detected and checked. The idea was that the farther the government is removed from the community, the more likely it is to tyrannize over that community. The classic illustration of this would be, of course, the conduct of England toward the colonies. There was, consequently, great jealousy of centralized government within the states, especially in New England, and everywhere there was opposition to a strong government over the states. A perfect expression of this latter feeling was the organization of the central government effected under the Articles of Confederation. Following out the principle of limiting the government as much as possible, there were many restrictions on its action in the state constitutions. In long and eloquent bills of rights notice was served on government not to trespass on certain fields of individual activity. Government must not interfere with freedom of speech, freedom of religion, freedom of assembly and petition, or freedom of person and property, except through the recognized and prescribed forms of law.

In these various ways, then, a strong effort was made to restrict the government to the minimum of strength; by the subordination of military to civil power, by the decentralization of political authority, and by the enumeration of specific guaranties against invasion of personal liberty and property.

In the same connection comes another theory widely entertained by the "Fathers," namely, that of the separation and balance of governmental powers. This doctrine had been formulated by Montesquieu in the *Spirit of Laws* (1749),[3] basing his reasoning, however, on observation of English conditions; both the theory,

[3] Book XI.

therefore, and the facts were well known among the Americans. They valued highly the division and balance of powers among king, lords, and commons, and saw in this piece of mechanism the strongest support of English liberty. Consequently they readily accepted and acted upon Montesquieu's theory. They firmly believed that unless the three classes of governmental power—the legislative, executive, and the judicial—were separated and a distinct organ of government provided for each class, there could be no certainty of political liberty.

In the state constitutions the idea of the separation of powers found the clearest expression. Massachusetts asserted that "in the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the legislative and executive powers or either of them—to the end that it may be a government of laws and not of men." A less doctrinaire statement was that of New Hampshire, to the effect that there should be such a separation of powers "as the nature of free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in an indissoluble bond of union and security."

Though the separation and balance of governmental powers was accepted in theory there was in practice no such equilibrium established as the theory called for.[4] On the contrary, there was an exaltation of the function and position of the legislature and a corresponding depression of the others, particularly the executive. Everywhere there was manifested great jealousy of the state executive, and numerous restrictions were thrown around his tenure, term, and prerogatives. In many cases the governor was elected by the legislature,[5] his term of office was limited to one year,[6] restrictions were placed upon his appointing power, and in only a few cases was the veto allowed.[7] The judiciary was declared independent by some states, but was generally dependent in respect to appointment and salary upon the governor and council, or even directly upon the legislature.[8] When it is further considered that in many states almost all of

[4] On the Revolutionary State Constitution see "The First State Constitutions," by W. C. Morey, in *Annals of the American Academy of Political and Social Science,* Vol. IV; also, in Vol. IX, "Revolutionary State Constitutions," by W. C. Webster.

[5] N. J., Del., Md., Va., N. C., S. C., Penn., Ga.

[6] N. H., N. C., Va., Mass., N. J., Penn., Ga., Conn., R. I., Md.

[7] Mass., S. C. (1776), N. Y. (with Council of Revision).

[8] Va., N. H. ('76), N. C., S. C., N. J., Del., R. I., Conn.

the important officers were appointed by the legislature; that in two states there was a unicameral legislature;[9] and that the constitution-amending power was often vested in the ordinary legislature,[10]—it becomes evident that the predominant position was held by that body. The strong dislike of the English crown and the royal governors had led to a reaction against executive authority in general that resulted in the practical supremacy of another of the three coördinate branches of government, namely, the legislature. There was naturally greater readiness to intrust the necessary governmental powers to this body, inasmuch as the legislators were regarded as the immediate representatives of the sovereign people. In the long and bitter struggles of colonial days, the Americans had learned to trust and rely upon the legislature, and to suspect and antagonize the executive. They, therefore, reduced to a minimum the powers of the executive and intrusted such authority as seemed necessary for the establishment of government to legislature. They did what the English parliament had done and was yet to do still more emphatically,—asserted the superiority of the legislature over the executive.

In addition to the separation of powers, another method used for the purpose of holding in check the government was the grant of power for a short term only. To guarantee security, it was thought that power must be kept close to its true basis, the people. In this way the rise of arbitrary rulers could be prevented and the officers intrusted with power be made responsible to the people. As John Adams once said, "where annual elections end, there tyranny begins."[11] This idea was conspicuous in the constitutions of the states, where frequency of election received both theoretical and practical support. Maryland declared "a long continuance in the first executive departments of power or trust is dangerous to liberty; a rotation, therefore, in those departments is one of the best securities of permanent freedom." Of like import was the statement of Massachusetts: "In order to prevent those who are vested with authority from becoming oppressors, the people have a right . . . to cause their public officers to return to private life." In general, officers were allowed short terms only. Governors were in many cases annually elected, legislatures for the same period, and other officers, with the exception of judges, followed the same rule. This requirement was made still more rigid by the provision in

[9] Penn., Ga., Vt.

[10] In Ga., Mass., and Penn., provision was made for amendment by a convention; in the other states where mention was made of amendment, the power was vested in the legislature.

[11] Cf. the Pennsylvania Constitution, Section 190.

many instances that the office-holder should be ineligible to the same office for a certain period of years, as one in three, two in four, or some like ratio. Thus the officer was not only limited to a short term, but was forbidden continued reëlection, and constitutionally forced to retire, even though his administration had been of the ablest kind. The evils arising from the existence of a permanent or hereditary office-holding class, it was determined to prevent even at the cost of administrative efficiency.

In these different ways, then, the attempt was made to keep alive the principle of popular sovereignty, and to prevent the development of a tyrannical government. What was feared at that day was not the incapacity or inefficiency of those conducting the administration, but the tendency of the ruling class to oppress in some way or other the class to be ruled. To the theorist of that time, every officer appeared to be a possible foe to the security of the individual and his property. The great guaranty of liberty was, therefore, to give the rulers as little power as possible and then to surround them with numerous restrictions, to balance power against power, to compel a frequent return to the people for renewal of the tenure of authority. This was the mechanism devised to carry out the democratic theory, and to prevent the recurrence of governmental tyranny.

It is essential to notice, however, that while the revolutionary theory was democratic on its destructive side, and to a certain extent on the constructive side, there were also present aristocratic tendencies of a pronounced character. Democracy had by no means reached the degree of development that was attained in the following century.

The most marked of these aristocratic features in the government of the "Fathers" was the limitation upon the suffrage. In actual practice the basis of their democracy was not very broad, or, at least, was relatively narrow when compared with that of the present day. The principle was laid down in some of the state constitutions that those were entitled to the suffrage who showed "sufficient evidence of attachment to the community." This evidence, however, generally consisted in the possession of a certain amount of property, preferably real estate. In discussing the subject of representation, Franklin said that "as to those who have no landed property . . . the allowing them to vote for legislators is an impropriety." [12] Hamilton considered that those who possessed no property could not properly be regarded as having a will of their own.[13]

In drawing up the state constitutions the property qualification

[12] *Works,* IV, 221, 1766.

[13] Ibid., II. 62 ff., *The Farmer Refuted.*

was adopted, as a guide for determining who should be entitled to participate in the choice of officers. The accepted idea was that the political people were the land-holding class. The states either required the possession of a freehold, or accepted a property equivalent of some kind. All the states agreed in requiring some evidence that the voter had a financial interest in the community,—either a free hold of a certain value, or other estate, or the payment of some public tax. The man who was not able to qualify in this way could not cast a vote under the laws of any of the states. He was not regarded as sufficiently attached to the community to justify participation in its political life. In this way the voting constituency was limited to a fraction of the adult male population, much less than half.

The same tendency is evident in the requirements for office-holding. Here also the property-holding class has the privileged position. It was provided in many states that the governor must be a freeholder, thus showing a preference not only for property in general, but for landed property in particular. In some instance the value of the freehold was fixed at a very considerable figure; in Massachusetts for example, at £1000, in Maryland at £5000, and in South Carolina at £10,000. High property qualifications were also required for many other offices, although not for all.[14] Generally speaking, therefore, participation in political life was limited to the most prosperous element in the population, and the government of that day was a government of and by the propertied classes.

In addition to these limitations upon the political people of 1776, there were also important religious restrictions. Notwithstanding the rationalistic tendencies of such leaders as Benjamin Franklin, Thomas Jefferson, and Thomas Paine, religious qualifications held a conspicuous place in the state constitutions. The principle of toleration for all sects was generally recognized, but the requirement of some religious test for public officers was not condemned by public sentiment. In certain states it was necessary that the governor be a Protestant,[15] in others that he be a Christian.[16] It was often specified that a member of the legislature must be a Protestant,[17] in some cases he must be a Christian.[18]

[14] An interesting discussion of legal qualificatons for office in America is given by F. H. Miller in the *Annual Report of the American Historical Association for 1899*, Vol. I.

[15] N. H., N. J., N. C., S. C. ('78).

[16] Md., Mass.

[17] Ga., N. H., N. C., S. C., N. J.

[18] Mass., Md. Pennsylvania required belief in God, future rewards and punishments, inspiration of Scriptures. In Delaware there was a similar requirement.

Freedom of worship was recognized in strong terms with the qualification that the exercise of the right should not disturb the public peace. For example, in Maryland freedom of worship was granted, "unless under colors of religion any man shall disturb the good order, peace or safety of the state, or shall infringe the laws of morality, or injure others in the natural, civil, or religious rights." This grant of general toleration was not construed, however, as prohibiting the financial assistance of the church by the state. In some cases the legislature was allowed to levy a tax for religious purposes, allowing the taxpayer to designate the religion to which he wished his contribution to be given.[19] This did not establish any one religion in preference to another, but was a political recognition of all the accepted religions. On the whole, there were but two states in which no religious qualifications or tests of any kind were required for office, namely, New York and Rhode Island.

On the other hand, however, there was inserted in the constitution of almost every state a clause forbidding the clergy to hold office under the state. This disqualification was sometimes absolute, extending to all civil offices, or it was sometimes applicable only to a seat in the legislature. The limitation was imposed for the benefit of both church and state, that there might arise no difficulties for either from too intimate a union.

It appears, then, that despite the assertion that all men are equal, the "Fathers" in framing their constitutions felt no reluctance about conditioning political rights upon certain financial and religious considerations. These restrictions operated to throw the control of political affairs into the hands of the freeholders who were at the same time Christians and preferably Protestants. This was the contemporary interpretation of the Declaration of Independence. The field of political privilege appears narrower still, when it is considered that the negro element of the population was held in slavery and had no political recognition at all. Evidently the "Fathers" themselves did not regard property, religious, or racial limitations as inconsistent with the rights of man or those principles of political philosophy to which such frequent reference was made.

[19] Religious establishments were constitutional in Conn., Mass., Md., N. H., S. C., Va. during the Revolutionary period.

3. DECLARATION OF INDEPENDENCE

IN CONGRESS

July 4, 1776

THE UNANIMOUS DECLARATION

OF THE

THIRTEEN UNITED STATES OF AMERICA

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed, by their Creator, with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and institute new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate, that governments long established, should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these Colonies, and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States. To prove this, let facts be submitted to a candid world.

He has refused his assent to laws, the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature, a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected, whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the State remaining, in the meantime, exposed to all the dangers of invasion from without, and convulsions within.

He has endeavored to prevent the population of these States; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of and superior to the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States:

For cutting off our trade with all parts of the world:

For imposing taxes on us without our consent:

For depriving us, in many cases, of the benefits of trial by jury:

For transporting us beyond seas to be tried for pretended offenses:

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies:

For taking away our charters, abolishing our most valuable laws, and altering fundamentally the forms of our governments:

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is, at this time, transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun, with circumstances of cruelty and perfidy, scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions.

In every stage of these oppressions we have petitioned for redress in the most humble terms: our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attentions to our British brethren. We have warned them, from time to time, of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which would inevitably interrupt our connections and our correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace friends.

We, therefore, the Representatives of the United States of

America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do in the name, and by authority of the good people of these Colonies, solemnly publish and declare, That these United Colonies are, and of right ought to be, *free and independent States;* that they are absolved from all allegiance to the British crown, and that all political connexion between them and the State of Great Britain, is, and ought to be, totally dissolved; and that as *free and independent States,* they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which *independent States* may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honour.

John Hancock.

4. THEORY OF REVOLUTIONARY PERIOD[1]

By Charles E. Merriam

It is necessary to turn now to a brief consideration of the source of the theory of this time. The origin of the dominant ideas during the Revolution is not difficult to find. As the Patriots were guided by the historical precedents established by England in the seventeenth century, so they followed the political theory developed at that time by the revolutionary party. The rejection of two kings within half a century was sufficient warrant for the refusal to obey George III. The colonists were not striking out upon a new and wholly untried path, but were following in the way broken by their ancestors of a few generations before. If revolution were wrong, then the House of Hanover had no legitimate claim to rule, and resistance to its members could not constitute rebellion. The same kind of reasoning used in justification of the revolution that drove out the Stuarts, might fairly be applied to the sucessors of the Stuarts. The *jure divino* theory had been repudiated in England, leaving only the argument from expediency, as the support of an existing constitution, and in accordance with this argument the colonists decided that independence from Britain was better than union with her.

[1] Reprinted from *American Political Theories,* Macmillan Company, New York, 1915, by permission of the author and publishers.

The advanced stage of development of English political speculation from the democratic point of view is often overlooked.[2] The doctrines of natural rights, the contract, popular sovereignty, the right of resistance, had been worked over and over by the popular leaders of the seventeenth century. The contract theory was advanced and defended by many able writers, conspicuous among whom were: Milton, in his *Areopagitica* (1644), *Tenure of Kings and Magistrates* (1649), and first and second *Defense* of the English people (1650–1654); Sydney, *Discourses concerning Government* (1698); and above all John Locke in his *Two Treatises of Government* (1689). These men stated the revolutionary doctrines in the boldest form.

The Patriots were familiar with this philosophy of their English predecessors and they followed it closely. They referred to these writers, quoted from them, and adopted the substance of their argument, and in some cases the form as well. Locke, in particular, was the authority to whom the Patriots paid greatest deference. He was the most famous of seventeenth century democratic theorists, and his ideas had their due weight with the colonists. Almost every writer seems to have been influenced by him, many quoted his words, and the argument of others shows the unmistakable imprint of his philosophy. The first great speech of Otis was wholly based upon Locke's ideas; Samuel Adams, on the "Rights of the Colonists as Men and as British Subjects," followed the same model. Many of the phrases of the Declaration of Independence may be found in Locke's *Treatise;*[3] there is hardly any important writer of this time who does not openly refer to Locke, or tacitly follow the lead he had taken. The argument in regard to the limitations upon Parliament was taken from Locke's reflections on the "supreme legislature" and the necessary restrictions upon its authority.[4] No one stated more strongly than did he the basis for the doctrine that "taxation without representation is tyranny." No better epitome of the Revolutionary theory could be found than in John Locke on civil government. The colonists claimed no originality for the fundamental doctrines they preached; in fact they declared that these ideas were at least as old as the days of Greece and Rome.

[2] This theory is analyzed by G. P. Gooch, in *English Democratic Ideas in the Seventeenth Century,* in Cambridge Historical Series, Vol. X, 1898.

[3] See Secs. 220, 222, 225, 230.

[4] See Sec. 135 ff. The four limitations upon the legislature, named by Locke were: 1. It cannot be absolutely arbitrary. 2. It must rule by standing laws. 3. "Cannot take from any man part of his property without his own consent." 4. Cannot transfer the power of making laws.

John Adams said: "These are what are called Revolution principles. They are the principles of Aristotle and Plato; of Livy and Cicero, and Sydney, Harrington and Locke; the principles of nature and eternal reason; the principles on which the whole government over us now stands." [5] The Patriots did not profess to have discovered a hitherto unknown system of political theory; on the contrary, they appealed to an old and long accepted theory,—a theory indeed upon which rested the legitimacy of the English political system of that day.

The French radical influence upon the Revolution was comparatively small. Montesquieu's *Spirit of Laws* (1748) was known to the colonists, and the doctrines therein contained were frequently quoted. But many of the features admired in Montesquieu were derived from his study of the English constitution and the English political system. This was eminently true of his celebrated doctrine of the tripartite division of governmental powers, which he had found or thought he found in the English constitution. Many of the other projects advocated by him were also derived from his study of English institutions. The greatest of the revolutionary philosophers of France, Rousseau, did not write his classic work, *The Social Contract,* until 1762, whereas the revolutionary doctrines of Otis were uttered in 1761. The general philosophy of the colonists shows little likeness to that of Rousseau, and but infrequent reference to his theory is made. Indeed, the fundamental ideas of the French writer were very similar to those of Locke.[6] There is little evidence to show that the bent of the revolutionary theory in America was determined by the great apostle of the French Revolution; but on the other hand very much to prove that the theory of Locke and the English school was predominant.

On the whole, the theory of the Revolution was in direct line with English political precedent and philosophy. In their destructive or revolutionary doctrine the "Fathers" of 1776 simply followed their "Fathers" of the preceding century. But in their constructive theory, notably in their substitution for monarchy and nobility of the many democratic features embodied in their state constitutions, they were striking out on new lines of political experiment. Many of these ideas, perhaps all of them, had been already suggested in the seventeenth century; but they had been unable to win a definite place for

[5] *Works,* IV, 15.

[6] Cf. D. G. Ritchie, "Contributions to the History of the Social Contract Theory," in *Political Science Quarterly,* VI, 664. In this connection see Georg Jellinek, *Die Erklärung der Menschen und Bürgerrechte,* Leipzig, 1895.

themselves in the English system of that day,[7] and were left to be realized in practice by the American democracy of the next century.

In conclusion, then, it appears that the fundamental political ideas in vogue among the Patriots were not the product of American soil, and were not original with the men of the Revolutionary day, but were the inheritance of English political experience and philosophy in the preceding century. The form in which they were expressed was striking and dramatic, but the ideas themselves were not new; on the contrary they were, from the view-point of political theory, doctrines long familiar. The teaching that all men are by nature equal is found in the Roman law,[8] while the idea that governments derive their just powers from the consent of the governed, is a long accepted maxim. Professor Gierke, the distinguished German authority, says that "from the end of the thirteenth century it was an axiom of political theory that the legal basis of all authority lay in the voluntary subjection through contract of the community ruled."[9] The doctrine of the right of resistance was stated with greatest emphasis by the political theorists of the revolutionary type in the sixteenth and seventeenth centuries.[10] To attribute the origination of these ideas to the men of 1776 is, therefore, simply to ignore the historical development of political theory. But in respect to the practical application of these doctrines, what has just been said does not apply; for a set of principles like those involved in the construction of state constitutions had never before received such public recognition. The destructive democratic theory of the day was old, but the constructive democratic theory as worked out in the state governments was the product of new conditions.

By way of summary, it may be said that the leading doctrines of the Revolutionary period were those of what is known as the *Naturrecht* school of political theory. They included the idea of an original state of nature, in which all men are born politically free and equal, the contractual origin of government, the sovereignty of the people, and the right of revolution against a government regarded as oppressive. The latter doctrine, in particular, was stated in the boldest and most uncompromising form, since this was the

[7] Cf. "The Agreement of the People," 1647, in Gardiner's *Constitutional Documents of the Puritan Revolution,* p. 270.

[8] *Digest,* L, 17, 32. Quod ad jus naturale attinet, omnes homines aequales sunt; from Ulpian, who died *circa* 328 A. D.

[9] Otto Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien,* Breslau, 1880.

[10] Cf. Rudolph Treumann, *Die Monarchomachen,* Leipzig, 1895.

ultimate argument upon which the Revolution rested for its justification.

On the constructive side, an elective executive was substituted for hereditary monarchy, and the institution of hereditary aristocracy abolished. The greatest danger feared was an oppressive government, hence numerous restrictions were placed on the action of its organs. Many rights were expressly reserved to the people, the tripartite separation of governmental powers was accepted, officers were made responsible to the people directly or through the legislature at frequent intervals, and often constitutionally disqualified for a term of years. Distrust of centralized government was shown at every point, with the exception of the legislature, which escaped popular suspicion.

It will be observed that the spirit of this reasoning was decidedly individualistic. The starting-point was the independent and sovereign individual, endowed with a full set of natural rights. He consents to give up a part of these natural rights to form a government by means of a contract. On this basis, political society and the state are constructed, and in this spirit political institutions are interpreted throughout. This was the general character of the revolutionary theories of the seventeenth and eighteenth centuries, and from this tendency America was no exception.

Kimball, *National Government,* pp. 1–34.
Ogg and Ray, (2nd Ed.), pp. 71–85; 86–106.

II

THE CONSTITUTIONAL CONVENTION

The Constitutional Convention of 1787 was the result of conservative rather than radical forces. It marked the beginning of a new governmental era as well as the end of the colonial period. The men who had dominated at the time of the Declaration of Independence had passed out of the picture and in their places had come a group who believed in the sanctity of property rights rather than in the natural rights of man. They were little concerned with the niceties of political theory; indeed the so-called "basic theories" of the Constitution scarcely existed in the minds of the framers at the time of its creation. Experience under the Articles of Confederation had shown the importance of a strong government in relation to trade, commerce, monetary affairs, foreign affairs, and the waging of war. Commercial and financial interests were of primary importance, and a government was established which would promote these activities and thus aid business. A government that would function was desired, and the framers' interpretation of "function" was the protection and extension of interests.

The movement for the ratification of the Constitution was not unanimous. In the words of John Quincy Adams, "it had been extorted from the grinding necessity of a reluctant nation." The closeness of the vote for ratification is clear evidence of the widely divergent views of the people. The Constitution did not go into effect with a blare of trumpets, but rather with the hopes of its friends and the fears of its enemies.

5. THE FIRST FEDERAL CONSTITUTION

Articles of Confederation and perpetual Union between the States of Newhamshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.

Article I. The stile of this confederacy shall be "The United States of America."

Article II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Article III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

Article IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other state of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State on the property of the United States, or either of them.

If any Person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

Article V. For the more convenient management of the general interest of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

Article VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted: nor shall

any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

Article VII. When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

Article VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

Article IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high

seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question. but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claims or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the State, where the cause shall be tried, "well and truly to hear and determine the matter in

question, according to the best of his judgment, without favour, affection or hope of reward": provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted, and said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States—fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "a Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for manageing the general affairs of the United States under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted,—to build and equip a navy—to agree upon the number of

land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secresy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be

furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

Article X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

Article XI. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

Article XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

Article XIII. Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

And whereas it hath pleased the Great Governor of the World to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles

thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the independence of America.

6. THE CONVENTION AND ITS MEMBERS[1]

By Max Farrand

Virginia had been the first state to act upon the suggestion of the Annapolis report and it followed its practice in providing for the state's representation in congress. The appointment of seven deputies was ordered by joint ballot of both houses of the legislature, any three of whom were authorized to join with the deputies from other states "in devising and discussing all such Alterations and farther Provisions as may be necessary to render the Fœderal Constitution adequate to the Exigencies of the Union and in reporting such an Act for that purpose to the United States in Congress as when agreed to by them and duly confirmed by the several States will effectually provide for the same." It will be noticed that the wording of this appointment is very similar to that in the Annapolis report. The modifications are slight and if they have any significance, they indicate a willingness on the part of Virginia to render the work of the convention effective.

At the head of its deputation Virginia placed the leading citizen of the state, and the leading citizen of the United States as well, George Washington. He was then fifty-five years of age and at the height of his popularity. The successful outcome of the Revolution had effectually silenced all criticism of his conduct of the war and his retirement to Mount Vernon had appealed to the popular imagination. The gratitude of a people, as yet unmixed with envy and undiminished by the rancor of party bitterness, placed him upon the very pinnacle of public favor. The feeling towards him was one of devotion, almost of awe and reverence. His presence in the convention was felt to be essential to the success of its work and much against his will, Washington was finally persuaded to accept the appointment.

Patrick Henry was the second on the list, but declined to serve.

[1] Reprinted from *The Framing of the Constitution,* Yale University Press, New Haven, 1912, by permission of the author and publishers.

The next year he came out in bitter opposition to the constitution. Dr. Grigsby, the historian of the Virginia state convention of 1788, reports that when asked why he had not taken his seat in the federal convention and helped to make "a good Constitution instead of staying at home and abusing the work of his patriotic compeers? Henry, with that magical power of acting in which he excelled all his contemporaries, and which before a popular assembly was irresistible, replied: 'I smelt a Rat.'" To the vacancy caused by Henry's refusal the governor appointed Dr. James McClurg, a learned physician, but with little experience in public life. Richard Henry Lee and Thomas Nelson were also elected but declined to serve. . . .

James Madison was the most inconspicuous of the Virginia delegation. He was slender, under medium height, retiring in manner and "always dressed in black." He was a student of history, methodical and indefatigable. But Madison took an active part in public affairs, and at thirty-six he had held various official positions in Virginia and twice represented his state in congress. Pierce described him by saying that "every Person seems to acknowledge his greatness. He blends together the profound politician with the Scholar . . . and tho' he cannot be called an Orator, he is a most agreeable, eloquent and convincing Speaker. . . . The affairs of the United States, he perhaps, has the most correct knowledge of, of any man in the Union." Madison was essentially a scholar in politics.

Two notable men completed this remarkable deputation. One was George Wythe, fifty-five years old, a signer of the Declaration of Independence, "the famous professor of law" at William and Mary, and for ten years a chancellor of the state. The other was George Mason, the author of the Virginia Bill of Rights and at sixty-two the rival of Patrick Henry in popular estimation as the champion of the rights of the people and of the states. According to Madison, he possessed "the greatest talents for debate of any man he had ever seen or heard speak." He was a gentleman of the old school, courtly but self-willed. . . .

Pennsylvania in appointing seven deputies, any four of whom were authorized to represent the state, specifically cited Virginia's act and vested its representatives with powers that were phrased like those of Virginia.

At the head of the delegation was General Thomas Mifflin, a former member and president of congress. At forty-three he was still extremely popular in spite of the fact that he had been a member of the cabal against Washington in favor of Gates. Next came "Bob" Morris, large, florid, and pleasantly impressive. Although

foreign-born, he had served his adopted country well as a member of congress, a signer of the Declaration of Independence, and as the financier of the Revolution. Much was expected of him in the convention because of the financial situation and the definite ideas he was known to possess upon that subject, and also because of the reputation that "when he speaks in the Assembly of Pennsylvania, he bears down all before him."

The less conspicuous members of the Pennsylvania delegation, although they had all been in congress, were: George Clymer, a signer of the Declaration of Independence, able but extremely diffident, and never heard to speak ill of anyone; Jared Ingersoll, the ablest jury lawyer in Philadelphia; and Thomas Fitzsimons, of Irish birth, now a prominent and successful merchant in Philadelphia.

James Wilson was the strongest member of this delegation and Washington considered him to be one of the strongest men in the convention. Born and educated in Scotland, he came to America when twenty-three years old. He had served several times in congress, and had been one of the signers of the Declaration of Independence. At forty-five he was regarded as one of the ablest lawyers in America. Tall and large featured, his near-sightedness compelling the use of glasses and adding a touch of sternness to his appearance, he had won the respect of many but the affection of few. "James the Caledonian," as he was sometimes called, was rather a tribute to his character and his oratory than a mark of popularity.

Gouverneur Morris was probably the most brilliant member of the Pennsylvania delegation and of the convention as well. Sharp-witted, clever, startling in his audacity, and with a wonderful command of language, he was admired more than he was trusted, for he was inconsistent and he was suspected of being lax in morals as well as lacking in principles. A crippled arm and a wooden leg might detract from his personal appearance, but they could not suppress his spirit. This story is told in various forms and doubtless has a foundation of truth, and the version which attaches the incident to the federal convention is as good as another: Morris was one day boasting in the presence of several delegates that he was afraid of no one, when Hamilton offered to bet him a dinner and wine for the company that he would not dare to treat General Washington familiarly by slapping him on the shoulder. Hamilton lost the bet, but Morris in recounting his experience said that he had never won a bet which cost him so dearly, and Washington had only "looked at" him.

Shortly before the convention met, by a special act of the legislature, the aged Benjamin Franklin, president of the state, was added to the

Pennsylvania delegation. "The American Socrates" was second only to Washington in reputation and popularity, but at eighty-one his powers were failing. Pierce notes with apparent surprise that "he does not shine much in public Council,—he is no Speaker, nor does he seem to let politics engage his attention. He is, however, a most extraordinary Man, and tells a story in a style more engaging than anything I ever heard." . . .

Georgia . . . William Pierce whose comments on his fellow-delegates have been so frequently quoted, was nearly fifty years old. He had served with distinction during the Revolution, and was at this time a delegate to congress. Although he did not attempt to describe his own character, but left it for "those who may choose to speculate on it, to consider it in any light that their fancy or imagination may depict," he was evidently blessed with a sense of humor. . . .

New York seems to have been responsible for this resolution [introduced in the Congress of the Confederation which provided for the calling of the Philadelphia convention] which was introduced in congress in accordance with specific instructions to its delegates by that state. The one serious obstacle to the convention being thus removed, New York promptly joined the other states, and using the words of the resolution of congress, appointed three delegates.

The first of these was Robert Yates, an able judge of the state supreme court. He was nearly fifty years old, had been a member of the New York provincial congress and had served on the committee that framed the state constitution of 1777. John Lansing was a young lawyer of moderate ability, but he evidently was something of a politician, for he had been a member of the state house of representatives, the mayor of Albany, and a delegate to congress.

The third and ablest of this delegation was Alexander Hamilton, who was one of the smallest men physically and one of the biggest intellectually who attended the convention. Only thirty years old, his reputation was already established by what he had done in the Revolution, in his state legislature, in the continental congress, and in the Annapolis convention. The logic of his arguments was convincing, but he was not a great speaker, except on the few occasions when his feelings overmastered his self-consciousness. He was too arrogant and over-bearing to be popular, but he was respected for his ability and admired for his originality and his daring. . . .

. . . Massachusetts cited the resolution of congress, and commissioned five delegates, any three of whom were authorized to represent the state "for the purposes aforesaid." Francis Dana,

one of the appointees, did not accept or at least did not attend the convention and the delegation was reduced to four.

Elbridge Gerry was small in person, but a prominent figure in state politics. At forty-three he had twice been a delegate to congress, and was one of the signers of the Declaration of Independence and of the articles of confederation. He was a successful merchant and greatly interested in questions of commerce and finance. Serenely confident of his own judgment, and unable always to distinguish between what was essential and what was of minor importance, his decisions and subsequent action sometimes seemed unreasonable, not to say erratic.

Nathaniel Gorham, twice a delegate to congress and president of that body during his second term, had left the president's chair to attend the convention. He was a man of good sense rather than great ability, but he stood "high in reputation, and much in the esteem of his Country-men." Pierce further said of him in his fiftieth year that he was "rather lusty, and has an agreeable and pleasing manner."

Rufus King, somewhat over medium height, was an unusally handsome man and with great personal charm. Of marked ability, and an eloquent speaker with a sweet, clear voice, it is no wonder that "ranked among the Luminaries of the present Age" he should be regarded as one of the coming men of the new nation. He had been opposed to any radical reform of the confederation, but convinced of his error he joined heartily in the work of the convention and, as might be supposed, his support was as heartily welcomed.

Caleb Strong, forty-two years old, tall and angular, was rather unprepossessing in appearance. Solid rather than brilliant, plain in speech and manner, and of sterling integrity, he was highly esteemed by his colleagues and was a good representative of the country people of Massachusetts.

Connecticut also specifically referred to the action of congress and appointed three delegates, any one of whom might represent the state "for the purposes mentioned." But as if in further explanation the act goes on to say "and to discuss upon such Alterations and Provisions agreeable to the general principles of Republican Government as they shall think proper to render the federal Constitution adequate to the exigencies of Government and the preservation of the Union." Erastus Wolcott having declined to serve, the commission consisted of Johnson, Sherman and Ellsworth.

William Samuel Johnson was sixty years of age and was regarded as one of the most learned men in this country; having received the

degree of Doctor of Laws from Oxford, he was always addressed and referred to as "Doctor" Johnson. A lawyer and judge who, in spite of his luke-warmness during the Revolution, was greatly respected, he had just been elected president of Columbia College. Gentle-mannered, and almost affectionate in his way of addressing acquaintances, he was loved as well as respected. Whenever he spoke, he was accorded the most careful attention.

Roger Sherman, the mayor of New Haven, was at sixty-six one of the older men in the convention. Tall, awkward, and almost uncouth, he was apt to be misjudged at first sight, for he was a man of ability and of great practical wisdom. Shoemaker, almanack-maker, lawyer, and judge had been the successive stages of his progress. "An able politician, and extremely artful in accomplishing any particular object;—it is remarked that he seldom fails." Another of his contemporaries wrote: "he is as cunning as the Devil, and if you attack him, you ought to know him well; he is not easily managed, but if he suspects you are trying to take him in, you may as well catch an Eel by the tail." He had been a member of congress and a signer of the Declaration of Independence and of the articles of confederation.

Oliver Ellsworth, forty-two years old, was a judge of the state supreme court who was greatly "respected for his integrity, and venerated for his abilities." An eloquent speaker and an able debater, he made an excellent third in this rather remarkable trio. A few months later the French *chargé d'affaires* in a report to his government spoke of Ellsworth and Sherman as typical of Connecticut, and went on to say: "The people of this state generally have a national character not commonly found in other parts of the country. They come nearer to republican simplicity: without being rich they are all in easy circumstances." . . .

Maryland . . . Luther Martin was an able lawyer, forty-three years old, who had been a delegate to congress and had been appointed attorney-general of Maryland. His career in politics was ascribed to the influence of undesirable interests, and it was said that he was sent to the federal convention for the purpose of opposing the establishment of a strong national government. He was a tiresome speaker, perhaps a trait that he carried over from his school-teaching days, and that fact together with the suspicion attaching to his motives did not insure him a cordial reception. . . .

. . . Nearly seventy-five names have been mentioned but characterizations have been attempted of only the fifty-five who actually attended the convention. In some respects they were a remarkable

body of men. At an average age of forty-two or forty-three, although one-sixth were of foreign birth, most of them had played important parts in the drama of the Revolution, a large majority, approximately three-fourths, had served in congress, and practically all of them were persons of note in their respective states and had held important public positions. In a time before manhood suffrage had been accepted, when social distinctions were taken for granted, and when privilege was the order of the day, it was but natural that men of the ruling class should be sent to this important convention.

Thomas Jefferson was in Paris and when he heard of the appointments he wrote to John Adams in London, "it really is an assembly of demi-gods." The opinion thus expressed has been commonly accepted since that time. The objection to it lies in the fact that the Virginia delegates whom Jefferson best knew were an unusual set of men, while many of the other delegates Jefferson knew only by reputation as men of prominence in their states. As a matter of fact, Virginia had set the fashion, which the country approved, and to be a delegate to Philadelphia became a desired honor. Appointments were accordingly sought and obtained in several instances by men of political influence. In other cases appointments were due to less worthy motives, approaching what might be termed corruption. In a few cases appointments were made for convenience' sake to fill up the state delegation. A contemporary, who was frankly in the opposition, wrote: "I do not wish to detract from their merits, but I will venture to affirm, that twenty assemblies of equal number might be collected, equally respectable both in point of ability, integrity, and patriotism. Some of the characters which compose it I revere; others I consider as of small consequence, and a number are suspected of being great public defaulters, and to have been guilty of notorious peculation and fraud, with regard to public property in the hour of our distress." [2]

Doubtless the truth lies between the two opinions. Great men there were, it is true, but the convention as a whole was composed of men such as would be appointed to a similar gathering at the present time: professional men, business men, and gentlemen of leisure; patriotic statemen and clever, scheming politicians; some trained by experience and study for the task before them, and others utterly unfit. It was essentially a representative body, taking possibly a somewhat higher tone from the social conditions of the time, the seriousness of the crisis, and the character of the leaders.

[2] Ford, P. L., *Pamphlets on the Constitution of the United States,* p. 115.

7. ECONOMIC INTERESTS OF MEMBERS[1]

By Charles A. Beard

A survey of the economic interests of the members of the Convention presents certain conclusions:

A majority of the members were lawyers by profession.

Most of the members came from towns, on or near the coast, that is, from the regions in which personalty was largely concentrated.

Not one member represented in his immediate personal economic interests the small farming or mechanic classes.

The overwhelming majority of members, at least five-sixths, were immediately, directly, and personally interested in the outcome of their labors at Philadelphia, and were to a greater or less extent economic beneficiaries from the adoption of the Constitution.

1. Public security interests were extensively represented in the Convention.[2] Of the fifty-five members who attended, no less than forty appear on the Records of the Treasury Department for sums varying from a few dollars up to more than one hundred thousand dollars. Among the minor holders were Bassett, Blount, Brearley, Broom, Butler, Carroll, Few, Hamilton, L. Martin, Mason, Mercer, Mifflin, Read, Spaight, Wilson and Wythe. Among the larger holders (taking the sum of about $5000 as the criterion) were Baldwin, Blair, Clymer, Dayton, Ellsworth, Fitzsimons, Gilman, Gerry, Gorham, Jenifer, Johnson, King, Langdon, Lansing, Livingston,[3] McClurg, R. Morris, C. C. Pinckney, C. Pinckney, Randolph, Sherman, Strong, Washington, and Williamson.

It is interesting to note that, with the exception of New York, and possibly Delaware, each state had one or more prominent representatives in the Convention who held more than a negligible amount of securities, and who could therefore speak with feeling and authority on the question of providing in the new Constitution for the full discharge of the public debt:

Langdon and Gilman, of New Hampshire.

Gerry, Strong, and King, of Massachusetts.

Ellsworth, Sherman, and Johnson, of Connecticut.

[1] Reprinted from *An Economic Interpretation of the Constitution of the United States* by permission of the author.

[2] See above, page 75, n. 3.

[3] See above, page 124. Livingston's holdings are problematical.

Hamilton, of New York. Although he held no large amount personally, he was the special pleader for the holders of public securities and the maintenance of public faith.

Dayton, of New Jersey.

Robert Morris, Clymer, and Fitzsimons, of Pennsylvania.

Mercer and Carroll, of Maryland.

Blair, McClurg, and Randolph, of Virginia.

Williamson, of North Corolina.

The two Pinckneys, of South Carolina.

Few and Baldwin, of Georgia.

2. Personalty invested in lands for speculation was represented by at least fourteen members: Blount, Dayton, Few, Fitzsimons, Franklin, Gilman, Gerry, Gorham, Hamilton, Mason, R. Morris, Washington, Williamson, and Wilson.

3. Personalty in the form of money loaned at interest was represented by at least twenty-four members: Bassett, Broom, Butler, Carroll, Clymer, Davie, Dickinson, Ellsworth, Few, Fitzsimons, Franklin, Gilman, Ingersoll, Johnson, King, Langdon, Mason, McHenry, C. C. Pinckey, C. Pinckney, Randolph, Read, Washington, and Williamson.

4. Personalty in mercantile, manufacturing, and shipping lines was represented by at least eleven members: Broom, Clymer, Ellsworth, Fitzsimons, Gerry, King, Langdon, McHenry, Mifflin, G. Morris, and R. Morris.

5. Personalty in slaves was represented by at least fifteen members: Butler, Davie, Jenifer, A. Martin, L. Martin Mason, Mercer, C. C. Pinckney, C. Pinckney, Randolph, Read, Rutledge, Spaight, Washington, and Wythe.

It cannot be said, therefore, that the members of the Convention were "disinterested." On the contrary, we are forced to accept the profoundly significant conclusion that they knew through their personal experiences in economic affairs the precise results which the new government that they were setting up was designed to attain. As a group of doctrinaires, like the Frankfort assembly of 1848, they would have failed miserably; but as practical men they were able to build the new government upon the only foundations which could be stable: fundamental economic interests.[4]

[4] The fact that a few members of the Convention, who had considerable economic interests at stake, refused to support the Constitution does not invalidate the general conclusions here presented. In the cases of Yates, Lansing, Luther Martin, and Mason, definite economic reasons for their action are forthcoming; but this is a minor detail.

8. THE COMPLETED CONSTITUTION[1]

By Max Farrand

The convention was over; it had completed its work. In the achievement of its task James Madison had been unquestionably the leading spirit. It might be said that he was the master-builder of the constitution. This is not an over-valuation of his services derived from his own account of the proceedings in convention, for Madison laid no undue emphasis upon the part he himself played; in fact, he understated it. Nor is it intended to belittle the invaluable services of many other delegates. But when one studies the contemporary conditions, and tries to discover how well the men of that time grasped the situation; and when one goes farther and, in the light of our subsequent knowledge, seeks to learn how wise were the remedies they proposed,—Madison stands pre-eminent. He seems to have lacked imagination, but this very lack made his work of peculiar value at the moment. His remedies for the unsatisfactory state of affairs under the confederation, were not founded on theoretical speculations, they were practical. They were in accord with the historical development of our country and in keeping with the genius of our institutions. The evidence is also strong that Madison not only took an important part in the debates but that he was actually looked up to by both friends and opponents as the leader of those in the convention who were in favor of a strong national government.

In these respects, he was in marked contrast to Alexander Hamilton, who was a stronger man intellectually, and suggested a more logical and consistent plan of government than the one which was followed. But Hamilton was out of touch with the situation. He was aristocratic rather than democratic, and while his ideas may have been excellent, they were too radical for the convention and found but little support. At the same time, being in favor of a strong national government, he tried to aid that movement in every way that he could. But within his delegation he was outvoted by Yates and Lansing, and before the sessions were half over he was deprived of a vote altogether by the withdrawal of his colleagues. Finding himself of little service he went to New York and only returned to Philadelphia once or twice for a few days and to sign the completed document in September.

Second to Madison and almost on a par with him was James

[1] From *The Framing of the Constitution,* Yale University Press, New Haven, 1912, by permission of the author and publishers.

Wilson. In some respects he was Madison's intellectual superior, but in the immediate work before them he was not as adaptable and not as practical. Still he was Madison's ablest supporter. He appreciated the importance of laying the foundations of the new government broad and deep, and he believed that this could only be done by basing it upon the people themselves. This was the principal thing for which he contended in the convention, and with a great measure of success. His work on the committee of detail was less conspicuous but was also of the greatest service.

Next to these two men should come Washington. Not that he ever spoke in the convention, beyond the one recorded instance at the close of the sessions. But as previously pointed out, personal influence must have been an important factor in the outcome of the convention's work, and Washington's support or opposition would be of the greatest importance. He voted with the Virginia delegation, his views were known, and it is therefore a matter of no little moment that Washington's support was given to Madison. Madison's ideas were the predominating factor in the framing of the constitution and it seems hardly too much to say that Washington's influence, however it may have been exerted, was important and perhaps decisive in determining the acceptance of those ideas by the convention.

Gouverneur Morris was a conspicuous member, brilliant but erratic. While he supported the efforts for strong national government, his support was not always a great help. His best work in the convention was as the member of the committee on style and arrangement to whom was entrusted the final drafting of the constitution. Charles Pinckney also took a conspicuous part in the convention, but his work is not to be classed with that of other and larger minds. It is undoubtedly true that he suggested a great many things that were embodied in the constitution, but they were minor points and details rather than large, constructive features.

Other members of the convention who deserve notice, though hardly to be classed with the names already mentioned, were Rufus King, General Charles C. Pinckney, John Rutledge, Nathaniel Gorham and, in spite of their refusal to sign the completed constitution, Edmund Randolph and George Mason. It may seem surprising that no particular mention is made of Benjamin Franklin, but it must be remembered that Franklin was at that time a very old man, so feeble that Wilson read all of his speeches for him, and while he was highly respected his opinions do not seem to have carried much weight. For instance, Madison recorded with regard to one of Franklin's motions: "It was treated with great respect, but rather

for the author of it, than from any apparent conviction of its expediency or practicability."

Thus far the men who have been considered were all supporters to a greater or less extent of a strong national government. On the other hand were men such as William Paterson, John Dickinson, Elbridge Gerry, Luther Martin, and the three Connecticut delegates, Oliver Ellsworth, William Samuel Johnson, and Roger Sherman. They were fearful of establishing a too strongly centralized government, and at one time or another were to be found in the opposition to Madison and his supporters. They must none the less be given great credit for the form which the constitution finally assumed. They were not mere obstructionists and, while not constructive to the extent that Madison and Wilson were constructive, it is certain that the constitution would not have assumed so satisfactory a form if it had not been for the part taken by them. Their best service was rendered in restraining the tendency of the majority to over-rule the rights of states and individuals in endeavoring to establish a thoroughly strong government.

The document which the convention presented to congress and to the country as the proposed new constitution for the United States was a surprise to everybody. No one could have foreseen the processes by which it had been constructed, and no one could have foretold the compromises by which the differences of opinion had been reconciled, and accordingly no one could have forecast the result. Furthermore, the construction of the document was unusual. Wilson and the committee of detail, and Gouverneur Morris and the committee of style had done their work remarkably well. Out of what was almost a hodge-podge of resolutions they had made a presentable document, but it was not a logical piece of work. No document originating as this had and developed as this had been developed could be logical or even consistent. That is why every attempted analysis of the constitution has been doomed to failure. From the very nature of its construction the constitution defies analysis upon a logical basis.

There would seem to be only one way to explain and only one way to understand the "bundle of compromises" known as the constitution of the United States. John Quincy Adams described it when he said that it "had been extorted from the grinding necessity of a reluctant nation." [2] The constitution was a practical piece of work for very practical purposes. It was designed to meet certain specific needs. It was the result of an attempt to remedy the defects experienced in the government under the articles of confederation.

A statement has been made as to what the delegates to the federal

[2] *Jubilee of the Constitution,* 1839, p. 55.

convention probably considered those defects of the confederation to be. We have seen that in the speech with which he opened the main business of the convention, Randolph pointed out the most glaring of these defects, and that he presented the Virginia plan as a basis of procedure in providing a remedy for those defects. We have seen how the Virginia plan developed step by step into the constitution. At every stage, suggestions for further remedies were made from one or another delegate, until every defect recorded as known to the members of the convention had been under consideration.

In the completed constitution: the president had been given the power of veto instead of establishing a council of revision; the federal courts instead of congress were to be relied upon to check improper state legislation; and no specific powers had been vested in congress to establish a national bank, to make internal improvements, or to legislate upon the subject of education. With these few exceptions, every known defect of the confederation had been provided for.

On the other hand, there is practically nothing in the constitution that did not arise out of the correction of these specific defects of the confederation. The completed constitution necessarily included many details that would not be mentioned in any enumeration of defects. Compromises had been necessary at every point, and those compromises in some cases produced unforeseen results. With those two qualifications, it would seem to be a safe statement that the only new element in the constitution, that is, the only thing not originating in the correction of the defects noted, was the provision regarding impeachment. This was such a natural result when a powerful executive had been established, that it is hardly worthy of record. It was as inevitable as it was to place limitations upon the extensive powers of congress in order to prevent abuse. When once prescribed for the president, it was but a step to include the "Vice President and all civil Officers."

It has long been recognized that the framers of the constitution were indebted to the constitutions of the individual states for many of the specific provisions in the federal instrument. But this becomes more significant in the light of the present study. However much the members of the federal convention may have prepared themselves by reading and study, and however learnedly they might discourse upon governments, ancient and modern, when it came to concrete action they relied almost entirely upon what they themselves had seen and done. They were dependent upon their experience under the state constitutions and articles of confederation. John Dickinson expressed this very succinctly in the course of the debates, when he

said: "Experience must be our only guide. Reason may mislead us." In fact, making allowance for the compromises and remembering that the state constitutions were only a further development of colonial governments, it is possible to say that every provision of the federal constitution can be accounted for in American experience between 1776 and 1787.

The lack of power to establish a national bank was one of the weaknesses charged against the government of the confederation. It was not specifically provided for in the new constitution, because its importance had not yet been realized. Hamilton's genius, within a year or two, was able to wrest its concession from a reluctant congress, but it required the disastrous financial situation in the War of 1812 to awaken the nation to the necessity of some such institution. In the same way, it was the unexampled spread of population beyond the Alleghanies, and the consequent necessity of better means of transportation, that brought the opposition to acquiesce in national support of internal improvements, which Washington had advocated long before the federal convention met. Gouverneur Morris claimed to have foreseen the acquisition of Louisiana and Canada and to have embodied in the constitution a guarded phrase which would permit of their retention as "provinces, and allow them no voice in our councils." He claimed that "had it been more pointedly expressed, a strong opposition would have been made." Whether or not the people of the United States in 1803 would have accepted Morris' point of view and granted the power he had advocated in 1787, the incident shows the subterfuges to which a farsighted member of the federal convention resorted in order to provide for possible contingencies beyond the ken of his fellow delegates.

If, then, the federal constitution was nothing but the application of experience to remedy a series of definite defects in the government under the articles of confederation, it must needs be that in the short space of time the confederation had existed experience could not have covered the whole range of governmental activities. Reference is not made here to contingencies impossible to foresee, such as the introduction of steam and electricity, but there were matters that it would seem inexplicable not to have provided for in an instrument of government, if the attempt had been made to frame a logical and comprehensive constitution.

The embargo of 1807 and the protective tariff of 1816 afford illustrations of matters outside the experience of the confederation and not having been expressly provided for in the new instrument raised many doubts as to their constitutionality. The great issue of states rights came forward most dramatically in the concrete

cases of nullification and secession. It would have been inexpedient to have forced this issue in 1787, when the fate of any sort of a central government was doubtful. But these subjects were probably not even seriously considered at that time; there certainly is no record of their being mentioned in the convention. Yet it is inconceivable that if Madison, or Wilson, or Hamilton had been permitted to frame a logical or consistent instrument of government, a constitution would have resulted which would not have covered such contingencies. It would seem, then, that the omissions in the constitution furnish a striking proof of its immediately practical character.

Robert Morris took no active part in the proceedings of the convention, but having followed everything that was done with the keenest interest, he wrote to a friend: "This paper has been the subject of infinite investigation, disputation, and declamation. While some have boasted it as a work from Heaven, others have given it a less righteous origin. I have many reasons to believe that it is the work of plain, honest men, and such, I think, it will appear."

It was this compelling feature, its simplicity, its practical character, that was responsible for the final adoption of the constitution when it was laid before the people of the various states. Here was a document which every one could understand. There were differences of opinion, of course, for such differences are inevitable in human nature, and convictions were as strong then as they are now. "In Halifax, Virginia, it is reported that a preacher on a Sunday morning had pronounced from the desk a fervent prayer for the adoption of the federal constitution; but he had no sooner ended his prayer than a clever layman ascended the pulpit, invited the people to join a second time in the supplication, and put forth an animated petition that the new scheme be rejected." Moreover, there is no doubt that the same class of men who may be regarded as responsible for the calling of the federal convention are also to be credited with getting the new constitution adopted. But public opinion, at least so far as it was represented in the state conventions, was divided, and some had to be won over. The substance of the argument which prevailed was: Reform is necessary; the new constitution proposes remedies with which all are familiar; and if the government does not work well, provision is made for changes at any time and to any extent.

Once adopted, the constitution succeeded beyond the hopes of its most ardent advocates. This of course was attributed to virtues inherent in the instrument itself. Respect and admiration developed and quickly grew into what has been well termed "the worship of

the constitution." It was this attitude that for so long obscured the insight into the real character of the document. And yet, soon after the federal convention was over, Madison himself had stated in the *Federalist:* "The truth is, that the great principles of the Constitution proposed by the convention may be considered less as absolutely new, than as the expansion of principles which are found in the Articles of Confederation. . . . If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of *New Powers* to the *Union,* than in the invigoration of its *Original Powers.*"

The articles of confederation had failed; the constitution succeeded. The former worked through the medium of the state governments; the latter by virtue of the power of taxation and of control over commerce, dealt directly with the people. But changes of that sort might have been engrafted upon the old confederation, without so essentially altering its character. Something more was necessary, and something more had been achieved.

A fundamental objection to the old confederation was the inability of congress to enforce its decrees. To remedy this had been one of the chief concerns of the federal convention. The most obvious provision was the power granted to congress "to provide for calling forth the Militia to execute the Laws of the Union." But the most significant provision was the clause originating with Luther Martin and modified by the committee of style to read, "This Constitution . . . shall be the supreme Law of the Land." Not a treaty, nor an agreement between sovereign states, but a law. It was a law enacted by the highest of all law-making bodies, the people; and in its enforcement the government was backed by all the armed power of the nation; but the significance is that it was a law, and as such was enforceable in the courts.

Still this was not enough. Over one hundred years before, in the preface to the *Frame of Government of Pensilvania,* William Penn had quaintly said: "Governments, like clocks, go from the motion men give them; and as governments are made and moved by men, so by them they are ruined too. Wherefore governments rather depend upon men than men upon governments." However radical the differences between the federal constitution and the articles of confederation, however sweeping the provisions of the later document and however carefully they might be worded, the most potent factor in rendering the new instrument of government effective was the changed attitude of the American people. When the federal convention had been called, trade was already improving though it was almost unnoticed. By the time the constitution was adopted and put

into operation, the improved conditions were plainly felt. And so it came about that in place of opposition or distrust, commercial confidence caused welcome and support to be extended to the new government.

Neither a work of divine origin, nor "the greatest work that was ever struck off at a given time by the brain and purpose of man," but a practical, workable document is this constitution of the United States. Planned to meet certain immediate needs and modified to suit the exigencies of the situation, it was floated on a wave of commercial prosperity, and it has been adapted by an ingenious political people to meet the changing requirements of a century and a quarter.

Beard, (4th Ed.), pp. 58–80.
Kimball, *National Government,* pp. 35–46.
Ogg and Ray, (2nd Ed.), pp. 107–120.

III

THE PARTY

The political party maintains its membership because eighty per cent of the voters adhere to the party affiliation of their parents, or are so influenced by their social and political environment that they will not break from the well-established party alignments. Issues may be dead but the party spirit continues even when there is no good reason for its continuance. Emotional prejudices are strong enough to keep the party members in line. The two-party system continues despite the demand for a third party, and the two traditional parties are so well intrenched that their ranks have hardly broken by the onslaughts of third party movements.

The basis for a party may be economic, social, or religious, as well as traditional. Continued prosperity makes it difficult for economic issues to develop, and until the present time the agricultural and labor groups, although economically they have much in common, have not been able to coalesce. Economic principles on which they might unite are not difficult to find, but the leaders have not been able to bring these ideas to the fore. United opposition to manufacturing, commercial, or industrial groups has not been developed. The agricultural and labor groups have been divided on the tariff and tax reductions, and in many cases the farmers have joined the commercial interests in opposition to the labor group, as in the case of child labor; and division has also occurred on Prohibition.

The two major parties create various anomalous situations, as in the case of the Democratic party of the South and the Republican party of the West. Perpetuation of old slogans, of old issues, of historical doctrines, still bulks large among the factors that determine party affiliation. New line-ups are difficult to secure and the party platforms continue to say the same things in two different ways. Continued prosperity will continue the situation and only economic diversity will force a re-alignment; and that undoubtedly will be an economic division. To say that parties represent distinct ideas of administration is to perpetuate an old fiction.

9. BIRDS OF A FEATHER[1]

A DISCUSSION OF OUR UNPRINCIPLED PARTY SYSTEM

By Walter Lippmann

In the heroic days when men and women were fighting for the right to vote it occurred to few of them, I imagine, that within a decade after universal suffrage was won, less than half the eligible voters of the United States would take the trouble to vote. Ten years ago we were still marching in suffrage parades. A few months ago we were gravely sending Boy Scouts abroad to round up so-called slacker votes, we were listening to judges who wanted laws to fine people for not voting, and some of us were wearing buttons telling others for the love of heaven to vote—to vote somehow, for anybody, but please to vote. We had a drive for votes, and the net result, although it showed a very slight gain over 1920 in the percentage of the eligible who voted, was insignificant compared with the effort made.

All this happened in spite of the announcement by the three candidates that the Republic was collapsing in three different ways. The danger was tremendous and we were beset on all sides—by bolshevism, if you listened to the Republicans; by Wall Street, if you listened to the Progressives; by grafters, if you listened to the Democrats. It was no use. More than half the voters would not rally to the Republic, and the percentage of the vote cast continued to decline as it has declined ever since the close of Reconstruction. In the Hayes-Tilden contest of 1876, out of every hundred eligibles eighty-six voted. Fifty years later, in the Wilson-Hughes contest of 1916, out of every hundred eligibles sixty-five were voting. In the Harding-Cox election only fifty-two out of a hundred voted. And last year there was no appreciable improvement.

If this vote is analyzed by States it soon becomes evident that there are whole sections of the country where the voters have, at least in national politics, come to the conclusion that their vote does not matter. I use the figures complied by Mr. Simon Michelet for the election of 1920. That year there were more eligible voters who did not vote than did vote in the following States: Maine and Vermont in New England; Pennsylvania in the Middle Atlantic group; California on the Pacific; Arizona in the Mountain States; Arkansas, Louisiana, Texas, Tennessee, Alabama, Mississippi, Virginia, South

[1] From *Harper's Magazine*, Mar., 1925. Reprinted by permission of the author and publisher.

Carolina, Georgia, and Florida in the South. That makes fifteen states. If you add the States in which there were eight eligibles who did not vote to every ten who did, you must add ten more. That included States like Massachusetts, Michigan, Wisconsin, Washington, Oregon, Wyoming, and Colorado. If you start at the other end and list the States which in the electoral sense are most alive, having two voters or more to one non-voter, there are only eight States. They are New Hampshire, Indiana, Missouri, North Dakota, Utah, Kentucky, Delaware, and West Virginia.

The lists tell their story to any practical politician. The dead States are the sure States. The live States are the fighting States. Where every vote counts, a high percentage of votes is cast. Where the vote does not change the result, a low percentage is cast. In Mississippi, to every hundred who voted, 736 sovereign voters did not go to the polls. In large areas in the United States the people have virtually disfranchised themselves in national politics because they have gone over preponderantly to one party or the other. They do, however, exert an indirect influence on the contests which decide the question of party leadership. A case could be made out, I think, to show that the active political life of the United States is not in the contest between the two great parties but in the contest within those parties. The McAdoo-Smith conflict had real meaning, the Coolidge-LaFollette conflict had real meaning; but the Coolidge-Davis conflict had very little meaning.

Why should that be? Why should the forces at grips in American life show themselves in the pre-convention contest and then disappear in the election campaign? Fundamentally, because at least eighty per cent of the voters are regular. They will follow any faction which captures control of the convention and calls itself the Republican or the Democratic party. Therefore, no matter how violently the other twenty per cent feel, their leaders have no place they can lead them to after a defeat in the convention. The people who are voting on principle are too small a band to constitute a political army. They may be important in determining who shall run the machine which holds the eighty per cent of regulars. But they are negligible as an independent body separated from the regulars. Therefore, after the convention storm and until election day is past, there is outward harmony. The defeated faction knows that its only hope of ultimate victory is to keep itself emotionally in touch with the regulars who vote the ticket and don't ask why.

That brings up to this point: Half the eligible voters do not vote. Eighty per cent of those who vote are regular. The existence of the preponderant regular mass transfers the active political life from

the election to the primaries where, for a brief period, the minority of independents are allowed to disport themselves and to exercise an influence out of all proportion to their numbers. When they have had their chance to capture the leadership of a party they subside under the mass of the regular vote.

That the two-party system does not under these conditions produce a direct conflict of principle is understandable. The victorious faction has not only to conciliate the defeated faction in its own party but it must bid for the movable vote in the other party. Therefore, the progress of an election campaign tends to show a steady closing up of issues that would divide men, a steady approach to the same apparently popular cries, a constantly increasing neutralization of the conflict. I have often thought during a national election that if it ran another six months the candidates would be using each other's speeches.

Now there are people who dream of belonging to a party which shall conform to Burke's definition that it be "a body of men united, for promoting by their joint endeavors the national interest, upon some particular principle in which they are all agreed." Neither party in America even approximately conforms to this definition. In defiance of Burke, in defiance of all the requirements of logical order, the American parties continue to be compounds of opposing factions and contradictory principles. About six months before every campaign, therefore, Mr. Munsey for the eastern conservatives, and my friends on *The New Republic* for the eastern liberals, announce that the time has come to realign the voters—to make a party for the conservatives alone and a party for the liberals alone.

And always there is no realignment. Mr. Coolidge as the representative of conservatism obtains the nomination and promptly turns his back on Edmund Burke in a hurried effort to nominate Senator Borah for Vice President. Mr. Davis obtains the Democratic nomination and promptly approves Charles W. Bryan. Mr. LaFollette sallies forth as a "progressive," leaving Mr. McAdoo in the Democratic Party and Messrs. Borah and Brookhart in the Republican. Something stronger than principle, some interest greater than intellectual neatness is at work to prevent consistent principled partisanship. The birds of a feather won't flock together.

There must be some reason why political life defies political logic in this fashion, some reason why Burke's definition of a party does not describe the American party system. Let us look again at his definition: "a body of men united . . . on a particular principle." How large a body of men must it be? Clearly it must be a body large enough to approach a majority of the active voters. They

are to be united, says Burke, on a particular principle. But is there any particular principle on which half the voters can unite and which the other half will also reject? To make a party, according to Burke's theory, the principle must not only unite its partisans but must be denied by the other party. In short, in order to align the American people into two great camps there would have to be some paramount issue on which they divided more or less evenly. And before one of these two could contain all the conservatives and the other all the liberals, there would have to be a paramount issue on which all the conservatives were agreed as against all the liberals.

There is no such issue in America. Is it the tariff? Obviously not. There are as many free traders in Wall Street as in the American Federation of Labor, and Mr. LaFollette is a better protectionist than many a conservative Republican. Is it nationalization of railroads? The project would be fought as bitterly by many liberals as by the conservatives. Is it the League of Nations? Page Mr. Borah, a liberal, and Mr. Newton D. Baker, another liberal. Is it prohibition? Consider dry Mr. McAdoo, wet Mr. Nicholas Murray Butler, dry Governor Pinchot, wet Governor Smith. Is it centralization? Then look upon the Democratic Party in the South, strongly for the Volstead Act and strongly against the Child Labor Amendment; and look upon the Democratic Party of the East, fiercely against the Volstead Act and largely for the Child Labor Amendment. Consider Senator Wadworth of New York, a leader in decentralization and Senator Walsh of Montana, a fairly consistent progressive centralizer. And then imagine, if you can, how the two parties are going to apply Mr. Burke's prescription.

When conservatism and liberalism are such a mass of contradictions, what reason is there for expecting them each to unite? It seems to me clear that the real alignments in America are local; that the national alignments are mere coalitions which create, not parties of principle, but governing majorities. Rather hasty observers have rather hastily argued that, because of rapid transit and standardized production on national lines, men's minds conform to national patterns. Let them explain, if they can, why the same temperamental conservatism or liberalism produces such utterly contradictory political programs in different sections of the country.

The best proof that local needs and local experience differ and are decisive lies in the fact that neither great party is able to adopt any consistent national principle. Our parties are federal in character because the political life of America is regional. Our parties represent a working union among diverse interests, and not a con-

solidation of their interests. Indeed, I think, the theory can be argued and established that the very absence of consistent national principle in either party, which is so disturbing to Mr. Munsey and *The New Republic,* is fundamental to the domestic peace of the United States.

For you have to start with many local political factions. There is an urban faction of employees in the Democratic Party of the East. There is an urban faction of employers and manufacturers in the Republican Party of the East. There is a rural faction in the East which is Republican. There is a rural faction in the South which is Democratic. There is a rural faction in the Northwest which is Republican. These interests are often in sharp opposition. Now, according to Burke, each faction ought to be a party contending in Congress for its principles. But that would give us many parties, none capable of establishing a government on the basis of a majority. It would give us also in Congress a three, four, five-cornered battle on principle, in which no principle could prevail in all its purity without outraging all of the other factions.

The American party system in its actual working is a most extraordinary device for creating a national majority out of regional factions. The party conventions are really the scenes of the great regional battles and compromises which have to take place somewhere if Federalism is to survive. The formal machinery of the American government—the Presidency, the Congress, the Courts—are much too rigid to effect the necessary federal adjustments. They would deadlock and crack under the strain of intransigent partisanship. They are protected against it by the party system, in which, precisely because party loyalty does not coincide with principle, partisanship acts as a cohesive and moderating influence. Instead of a politician becoming more and more logical under the pressure of his following, he becomes more conciliatory because he has to keep in touch with a diverse following.

Whether this is good or bad must be determined, in the last analysis, not by a prejudice in favor of consistency but by the answer we make to this question: Do we really desire the federal government to govern so as to divide the nation into two camps of crusaders? If we do, then the present system is indefensible. But if we take the position that the main business of the federal government is to establish security abroad and to cherish local self-government at home, then a great deal can be said for the party system. It is not a system adapted to the execution of great controversial policies. Major policies can be carried out only with bipartisan co-operation. But it is a system under which the frictions of federalism are reduced

to manageable proportions. And that may not be a small service to popular government.

10. PROGRESSIVISM AND THE DEMOCRATS[1]

Official returns for last November's election have now been published. They show that Mr. Coolidge received 15,718,789 votes, Mr. Davis 8,378,962 and Senator LaFollette 4,822,319. Mr. Coolidge's margin over his Democratic opponent was therefore 7,339,827, larger by 334,980 than was Mr. Harding's in 1920.

Studying the LaFollette vote and comparing it with that of Mr. Roosevelt in 1912, the New York World comes to some interesting conclusions. It finds on computing the percentage of the total vote obtained in each case, that

> bolting as Mr. Roosevelt bolted, and carrying the Socialist endorsement which in 1912 favored Mr. Debs, Mr. LaFollette in 1924 polled less than half the share of the national vote that went to Roosevelt and Debs in 1912. His percentage of the total is 16.7. Roosevelt and Debs had 33.9 between them; Roosevelt alone, 27.8 percent.

The World then goes on to show that the new Progressive party exhibited its strength in the same parts of the country where the old one was strongest and that LaFollette ran far behind the Roosevelt percentage in every section. Moreover, the World charges that the LaFollette vote was so "spotty"—ranging from 9.9 percent for New England to 23 percent in the wheat belt and 32.9 on the Pacific Coast—that 1924 progressivism stands revealed as

> a movement making its appeal essentially to local blocs and on local issues . . . to date there is not the structure of a national party here. There is only a grand alliance of congenial factions.

We have no wish to minimize the seriousness of the situation the World sets forth regarding the smallness of the LaFollette vote. We were disappointed with the showing made by the Progressives in 1924, and that disappointment is not lessened by careful analysis of the final result. We believe it is unfair, however, to compare the LaFollette results with those achieved by Roosevelt in 1912, and argue therefrom that Progressivism has necessarily lost ground in America in the past twelve years.

[1] From the *New Republic,* January 14, 1925. Reprinted by permission of the publishers.

For the Roosevelt vote in 1912 was by no means made up exclusively of genuine progressives. If no other evidence existed, the support of men like Frank A. Munsey and George W. Perkins would be sufficient guarantee of that fact. Roosevelt was the most popular political personality of a generation, if not indeed of our whole history. His popularity was only very partially based on his progressivism—real or imaginary. Undoubtedly many thousands of those who proudly called themselves Bull Moosers in 1912 regarded the LaFollette campaign of 1924 with horror as being ultra-radical. The 1912 split in the Republican National Convention came over personalities, not issues; and in the Roosevelt ranks were included all—and they were numerous—who had any reason to be disgruntled with the Taft machine, from any point of view.

To his personal popularity Roosevelt added two other advantages neither of which was available to LaFollette. He had been President of the United States for nearly eight years, and possessed both the great prestige which inheres in that office and the nationwide organization which every President automatically builds up. He had also very large financial resources, while the LaFollette-Wheeler forces in 1924 were badly handicapped by poverty.

To these factors which help account for the good showing made by Roosevelt in 1912 must be added at least one which accounts for the comparatively poor showing of LaFollette in 1924. The Progressivism of 1912 was after all a pretty mild variety. The platform called for the direct primary, woman's suffrage, the initiative, referendum and recall, a lower tariff, restrictions on injunctions in labor disputes, a parcels post system, and the like. Roosevelt did not receive the Socialist support, likely in America to prove a deadly incubus. The Russian communist experiment still lay in the future and the Bolshevist bogey, which the reactionaries find so convenient, had not yet been invented. Economic pressure such as was applied to thousands of working men in 1924 to force a vote for Coolidge was used little or not at all. When we consider all these factors, for LaFollette, under the handicaps he suffered, to poll more than one-half the percentage secured by Roosevelt can only be reckoned as a very considerable achievement.

There is another aspect of the question raised by the World which deserves thoughtful consideration. That paper has long and steadfastly urged that since a third party has "no hope" of winning an election, persons of progressive views would be well advised to enroll under the Democratic banner, capturing command of the party if they can. We have no desire to adopt a tu quoque argument; but certainly neither the immediate record of the party nor its history

during the past fifty years gives any reason to be optimistic over its future ability to enroll a majority of the voters.

From Roosevelt to LaFollette represents a decline in percentage from 27.8 to 16.7; but from Wilson in 1912 to Davis in 1924 also represents a decline in percentage, from 48 to 28. If the solid South be eliminated as it fairly may since much of the Southern Democracy does not represent a political conviction but an hereditary quarrel, the percentage becomes: Wilson 38, Davis 25. Mr. Harold Rountree has pointed out that since 1860 the Democratic party has never had a majority of the total vote and has had a plurality only once, in 1912. The almost steady decline in the proportion of the total vote of the party (exclusive of the solid South) is most striking. In 1876 it was 47 percent. By 1884 it was 45, and by 1900, 42. Thereafter it reads:

	Percent
1904	34
1908	40
1912	38
1916	46
1920	30
1924	25

The weakness of the Democratic party in 1924 is even more clearly revealed if the vote for Davis be analyzed sectionally. In the far West, he received less than two-thirds as many votes as LaFollette. In the Middle West, his vote was still slightly smaller, in the East it was about twice as great. LaFollette ran second in California, Idaho, Iowa, Minnesota, Montana, Nevada, North Dakota, Oregon, South Dakota, Washington and Wyoming. Davis ran third in each of these states and also in Wisconsin where he got less than 10 percent of the vote cast. If we must still admit the existence of a solid South rigidly devoted to the Democratic party, we must also admit that there is a solid West in which that party is today only a vestigial remnant. To be sure, a party can sometimes come back. Conservative Republicanism in 1912 secured only eight electoral votes—those of Utah and Vermont—and yet lived to achieve 404 in 1920. What reason is there to believe that the northern Democracy will not some day be able to equal this achievement?

We have already hinted at the reason. It is because the real issue dividing the American people today creates an alignment which leaves the Democratic party no battleground. The division is between conservative and progressive, and the Democratic party is

in fact neither—or rather, in its membership, it is both. Thousands of northern Democrats voted for Coolidge because Davis wasn't conservative enough for them. Thousands more voted for LaFollette because Davis wasn't progressive enough for them. A comparison of the Coolidge figures with those of Harding in 1920 in the states west of the Mississippi and north of the fortieth parallel of latitude shows that the LaFollette campaign drew many more votes from Democratic than from Republican sources.

The northern Democratic vote, in other words, and especially its more active and intelligent element, is splitting two ways. Its conservative wing is tending to join the party which has now become the real seat of conservatism, the Coolidge Republicans. Its progressive wing has already begun to go over to the group which was headed by LaFollette in the late campaign. That movement, we believe, will be accentuated in the future.

Naturally, there is a temptation for liberal leaders in the Democratic party, such as the New York World, to urge all progressives to get together, capture the Democracy, and give battle to the conservatives with the aid of a conscript army from the solid South—that South which provided even Mr. Davis with 1,900,000 votes. Such an alliance seems to us extremely undesirable, and for two reasons. First, it would be founded on a lie. The South is not progressive. It actually gave Mr. Coolidge 900,000 votes, nearly a third of its total, in 1924. Its industrial development which today is strikingly like that of New England seventy-five years ago, is rapidly breeding men possessing the same general type of conservatism. And in the second place, capturing the party is impossible. Its national conventions have at least the merit of being, except for the northern delegations, unbossed. It chooses its leaders on its own terms, and whether they are progressive or not is an accident or an after-thought, with the chances all against it. After June, 1924, it takes a rash man to talk of capturing the party. In that year, the Democrats had it in their power, as they very well knew, to say whether there should be a third party movement. Yet they hardly gave the matter a thought but plunged ahead, producing a platform and candidate of such a character as to make the election of Coolidge a certainty, even if it had not already been so.

The beginning of a progressive party which now exists in this country is, we concede, small. But at least it is genuine. As honesty goes in politics, it is unusually honest, and will be more so when it has freed itself of some minor extraneous elements by which it is still hampered. Perhaps it will need to fight for a long time before it becomes a majority party. That is not a calamity; the curse

of American politics is the itch for immediate temporal power. An aggressive minority group in opposition can accomplish a great deal, sometimes even more than if it assumes office. Such an opportunity to exert moral pressure would be thrown away if an unreal and equivocal bargain were made with the Democrats, the only object of which would be to secure office at once, under circumstances which would make effective government almost impossible.

II. CAN WE SAVE THE DEMOCRATIC PARTY?[1]

AS ONE DEMOCRATIC EDITOR SEES IT

By George F. Milton

I

Of no American institution has prediction been so sterile, and the application of remorseless logic so bewilderingly unsatisfactory, as of the Democratic party, which has housed beneath its single roof-tree such diverse characters as Woodrow Wilson and Charles F. Murphy, Thomas Jefferson and George E. Brennan. The present effort of its leaders to arrive at a formula for its renaissance makes an analysis of its elements of strength and weakness pertinent and timely.

To-day we really have three Democratic parties bearing identic name, but antagonistic in several basic doctrines, programs, and ideals. To unify all three is apparently impossible; to join any two of them difficult, but practicable. Failure to secure a satisfactory synthesis of two of the three spells party disaster; discovery of a highest common denominator offers opportunity of victory.

The three parties are those of the South, the West, and the East. Economic interests, social conditions, racial prejudices, differing religious faiths, the clash of altruist and materialist, tend to separate them.

In the "solid South" the Democratic party is traditional, racial, and, to a degree, beset with a creedal complex. By fortuitous accident, the climate and soil of our Southern States supplied a willing realm for King Cotton. New England skippers brought negro slaves to the cotton-fields, after which the South championed involuntary servitude. The Civil War and the Fourteenth Amendment wrenched human slavery from America, but neither solved

[1] Reprinted from the *Century Magazine*, May, 1925, by permission of the author and publishers.

the negro problem nor altered our basic cotton agronomy. So long as the colored brethren retain their solidarity for a party, which sixty years ago freed them and ever since has been swindling and swash-buckling them, just so long will the cotton commonwealths remain inflexible in their party fealty.

The party in Dixie has been deeply conservative—often reactionary as to economic advances and as to governmental attention to distressed units of our complex social organism. Child-labor legislation encounters stern vetoes by Southern textile magnates; modern labor laws, chilled in the rural regions by the apathy of the highly individual farmer, in the cities meet determined opposition from dominant finance and commerce. Woman suffrage was fought vigorously, often viciously, as a state's rights invasion. By a geographic anomaly Tennessee was the "perfect thirty-six" to ratify the Nineteenth Amendment. Yet prohibition, regarded in the East as a more fundamental assault on states' rights and Jeffersonian personal liberty, found the South enthusiastic and aggressive in its behalf; again a negro problem reflex.

Southern Democracy has always had a strong evangelical Protestant tinge. Our States boast of a larger percentage of pure-bred Anglo-Saxons than any other; a great share of these, motivated emotionally more than rationally, have been a fertile field for sectarian enthusiasms and prejudices. Politicians accept this fact, with its corollary taboos.

Economic problems, far from lacking, have not yet been translated into political activity, principally because of the Southern farmer's inability or unwillingness to attribute economic misfortune to legal inequality. There are signs of growing class consciousness—notably the cooperative cotton movement and the Muscle Shoals fight—which may cause us some day to imitate the Northwest's political hejira for agrarian relief. Dixie is gradually recovering from its long continued Bourbonic plague.

Quite different is the Democratic constituency and attitude throughout the West, where politics is of the present and not the past; where men join parties and vote for candidates because of economic interests, not furled banners or entombed sires. Here Democracy is peculiarly the champion of economic causes. Throughout the trans-Mississippi, with the exception of Texas, Louisiana, and Arkansas, its basis is economics, not tradition.

Through these States, the farmers, workers, and liberals are decidedly informed economically. Northwest wheat-growers, Rocky Mountain miners, Coast State homesteaders, have wrought by the sweat of their brows; each season sees a struggle with a grim Mother

Nature and a foreboding law of supply and demand. The citizens of the West are quick to detect government inequalities and economic iniquities. They say what they want, and have the courage to seek it regardless of opposition or abuse.

The Western Democratic party is essentially progressive, almost radical. In Nebraska, Iowa, South Dakota, Montana, Colorado, California, one finds Democratic backing for state farm loans, state gasolene sale at cost to consumers, government ownership of railroads, child-labor legislation, full facilities for farm coöperation, federal marketing supervision. Here one finds vigorous denunciation of government by injunction. The farmer is class conscious, labor is assertive and well supported.

Democrats of the West think little of states' rights, a great deal of people's rights. They are habitually opposed to corporation control of government. They are in tune with the social and economic spirit of the times, and reflect it in their views of Democratic principles, aims, and leadership.

The third Democratic facet is in the East. Here again one finds religious intolerance, dense masses of newly naturalized immigrant voters, and boss-ruled cities. Eastern farmers are principally Republican. Large cities, with their immigrant throngs, give rise to Democratic organizations such as Tammany Hall, the Boston "organization," the Illinois Cook County machine.

There are millions of Democrats in the Eastern States who are just as good Democrats as any elsewhere in the country, and who often are as irritated at the boss control as are their allies of the West and South. However, they do not furnish the party's leadership in the East, being generally helpless before the technically incomparable organization, down to the last precinct officered and directed by the city bosses, who are commonly charged with being tools of the corporate interests.

If the party in the South is idealistic, traditional, individual, national, the party in New York, Massachusetts, Illinois, and Ohio, is local, commercial, boss-organized, boss-ridden. It is as highly industrialized as the region it inhabits.

Can the Democratic party, or any two of its three major divisions, ever be sufficiently in accord on fundamentals to unite on a liberal program of social and economic justice? Can two groups agree on a candidate virile enough to vitalize the issues? Is the party mechanical mixture without chemical affinity, bound to separate when agitated?

The lack of thorough accord between the West and the South is not fundamentally incurable. Their economic and social interests are surprisingly similar. They are well united by their fundamental

industry of agriculture. It joins them in opposition to industrial aggrandizement. It inclines both to moderate tariff policies. South and West cherish similar desires for better agricultural credit systems, improved marketing facilities, more adequate foreign trade relations. They are united against Wall Street, that mythical (yet very real) personification of the industrial East.

This struggle between conflicting interests of agriculture and industry, underlying American politics for more than a century, exists today, undiminished, as a vital political force. On the side of industry are the aggregations of capital with control concentrated on the East; on that of agriculture, individualistic farmers of the South and class-conscious grain-growers of the West. Labor, finding its own interests (good working conditions, adequate wages, and steady employment) best furthered by agrarian economics, generally casts its lot with agriculture.

The Democratic party as a virile political force can alone survive through the union of the South and the West. They are the natural Democratic allies. They offer the only feasible Democratic union.

2

The party struggle, epitomized by the choice of the Presidential nominee, between the loosely connected West and South and the organized East, has been waged for at least four decades. In 1884, despite Tammany Hall, Grover Cleveland, Governor of New York, was victor. In both 1888 and 1892 he was again the nominee. Then was coined of Mr. Cleveland the famous phrase, "We love him for the enemies he has made," chief of whom was the Tammany tiger.

Since Mr. Cleveland's last term, the West has at times been triumphant within the party. The results were the three candidacies of Mr. Bryan, and the two Presidencies of Mr. Wilson. The East's victorious moments have been signalized by the mortification of Judge Parker, the repudiation of Governor Cox, and the crashing disaster of Mr. Davis. These spokesmen of the Eastern party are by no means personally responsible for their failures. They are genial men of indubitable ability.

When the party began to consider the selection of a 1924 standard-bearer, 1920's dolorous diary was before it. But the one-third rule, trusted instrument of the wet-boss-Wall Street alliance, remained intact. This group incomparably prefers its own retention of party control, though this insures defeat at the polls, to the nomination of a progressive Democrat.

In December, 1923, when South Dakota formally proposed Mr. McAdoo for the Democratic nomination and he announced his candidacy, the wet-boss-Wall Street alliance was already actively at work against him. It evaded joining the issue on prohibition, Tammany domination, or economic reform, but grasped every irrelevancy that arose. For several months it had sought vainly to make headway against the former secretary by use of the specious phrase, "He ruined the railroads." Then E. H. Doheny testified before the Senate Oil Committee, in February, 1924, that he had retained Mr. McAdoo's firm in a Mexican negotiation. The anti-McAdoo forces were jubilant. In the inflamed state of public opinion, following the disclosures of the Republican oil scandals, Mr. McAdoo's enemies felt that linking any individual with the alleged bribe-givers, even though in an entirely ethical professional relationship altogether foreign to the matter under investigation, would eliminate him from politics completely and finally. To their surprise, county conventions in Missouri, and early primaries in Georgia, the Dakotas, California, and other States, showed that the talk of "oil" had been futile. Mr. McAdoo came to the New York convention with far more instructed or committed delegates than any other aspirant. The injection of the Ku Klux Klan issue ensued as a last effort to block his nomination. His enemies deliberately decreed a political St. Bartholomew's Day.

George E. Brennan, Roger Sullivan's successor as Chicago political boss, had caused to be adopted at his Illinois state convention in April a platform omitting the "three little words." Two months later in New York he was the main insister for them.

After the convention, the Democratic National Committeeman of a Southern border State was talking with the Illinois "leader." "Why did you drag the Klan fight into the convention?" the committeeman asked. "It almost killed the Democratic party!" "Yes, it did," Mr. Brennan replied. "But it was the only thing we had left to stop McAdoo, and, by God, it worked!"

The Klan fight in itself did not cause the deadlock. There were added certain "favorite sons," before each of whom Tammany successfully dangled the bait: "The Smith vote will come to you, if you stay in," and each of whom swallowed it, hook, line, and sinker. Their votes plus the anti-Klan bloc totaled more than a third of the convention.

When Mr. McAdoo released his delegates, and Governor Smith withdrew, the convention had been in session two weeks. The delegates were exhausted, emotionally, mentally, financially. Mr. Davis's choice then ensued, the result of exhaustion, not of delibera-

tion. The nominee had not aided the measures against Mr. McAdoo. He was an innocent bystander in that political assassination. Yet he became chief personal beneficiary from it.

3

Immediately after Mr. Davis's nomination, spokesmen of the Western Progressive group waited upon him; the Tammany leaders did likewise. He was then presented with the necessity of a choice between trying to carry the East and trying to carry the West. Progressive Democrats told him that he had no chance in the East; but that he might make some headway in the West, if he would spend a good deal of time there, hammer Wall Street, and proclaim and emphasize a liberal attitude on railroad and farm questions.

Tammany told Mr. Davis his only chance was in the East. The tiger assured him that he could carry the pivotal Eastern States of New Jersey, New York, Illinois, and Ohio. He took the Tammany advice. He never visited the Pacific coast. His trips elsewhere in the West were fleeting. Beginning with his acceptance speech, he went very easy on the railroad and allied questions. He departed from the party platform on the League of Nations and the Klan. His campaign was Tammanyized. He was badly defeated in the West because he deliberately neglected it.

Prior to June twentieth, few well informed Republicans privately claimed their party had much chance of victory. After the Klan fight at New York their sole care was to keep the election out of the House. They also rejoiced at being able to cleanse the party of Progressives without danger, in contrast to 1912, when the price of house-cleaning was Mr. Wilson's election. This year they expected the election by default.

The Progressives, little disturbed at being ousted from the G. O. P. sanhedrim, cherished no hopes of electing Senator LaFollette; their hopes of the election being thrown into Congress disappeared a month before November fourth. Their basic aim was to kill the Democratic party; they realized that under our constitutional plan of choosing a President, a two-party system was inescapable. Senator LaFollette hoped his candidacy would wound the Democrats unto death, so that his Progressives could appropriate the carcass, and gormandize on the remains. He aimed his blows at joints in Democratic armor. The way he ignored the traditional second party was most irritating to the Democratic chiefs, almost as much as the Republican silent treatment of Mr. Davis.

The Democrats wanted to win. The party chiefs soon realized

their sole chance lay through combination with the Progressives to prevent a Coolidge electoral majority. Mr. Davis's advisers hoped that, if this were effected, the Bryan bogy would frighten enough Republicans in the House to Mr. Davis to elect him. Governor Bryan's friends breathed fervent hopes that the House would be unable to select, and Governor Bryan, chosen Vice-president by the Senate, would become on March fourth, the Acting President.

Mr. Shaver's aides sought informal reciprocal agreements with the Progressives and with Labor. The overtures arrived nowhere. The Progressives would not deal. Why, indeed, should they aid to elect a Democrat, when their main aim was the death of the Democratic party?

The election enabled the Republicans to realize their fondest hopes. The election did not even go near the House; the cleansing process was complete and economical. The Progressives, not expecting victory, were not disappointed. They polled almost five million votes. They claim their intended homicide against the Democratic party has been successful; they feel it is grievously wounded, and cannot recover. Democratic aims failed entirely.

Republican claims of a blanket vote of confidence are not borne out across the Mississippi. In eight Western States, Davis and LaFollette votes combined were greater than the Coolidge votes: Idaho, Montana, Nevada, New Mexico, North Dakota, Utah, Arizona, and Wisconsin. Had the Democrats selected a nominee acceptable to the West, he would have carried these States at least. In six other Western States, notably California, Washington, Minnesota, Iowa, Missouri, and Colorado, the combined LaFollette and Davis vote approached narrowly the Coolidge vote. In these, as well as in the first group, both Democrats and Progressives realized the improbability of defeating Mr. Coolidge. Votes against him, whosoever secured them, were protest votes. Had there been a Democratic candidate "with a chance" against Mr. Coolidge, undoubtedly hundreds of thousands of the Western stay-at-homes would have voted for him; and many hundreds of thousands more who followed the line of least resistance by voting for Mr. Coolidge so as not to "waste their vote" would have voiced their real feelings. How can the Republicans secure solace in the West out of victory by default?

From a national point of view the results in the East were more disheartening than in the West. Even in the States of Tammany assurances to Mr. Davis, in which hitherto good Democratic machines had functioned, the Coolidge vote was far in excess of his and the LaFollette votes combined. Mr. Davis did not receive a third of

the total vote in New York, New Jersey, Pennsylvania, Connecticut, Massachusetts, or Illinois. The Democratic vote percentage of these States in recent elections is illuminating:

	1916	1920	1924
New York	47	30	29
New Jersey	44	30	21
Pennsylvania	43	29	10
Connecticut	48	35	30
Massachusetts	48	29	25
Illinois	45	27	23

The home precinct in Manhattan of Boss Murphy's successor went for Coolidge, just as the Murphy precinct went for Harding in 1920. Governor Smith, locally most popular, carried only three counties in his State. George Brennan's Cook County ticket, despite Mr. Davis's barn-storming, went down in smashing defeat. The Ohio Coolidge majority compared favorably with the Harding one in 1920. Nowhere in New England was the Davis vote even significant. He carried only one New Jersey county. He lost Maryland; his home State of West Virginia, and Indiana, in which all circumstances should have favored him. If this election proved nothing else, is demonstrated the utter impossibility as alinements are now fixed, of the Democratic party succeeding in the Northeastern States. The Solid North, as a formidable Republican bloc, has replaced the Democratic Solid South as America's political Arctic Circle. The battle-ground for our party is the West, not the East.

4

Which way are we Democrats to turn? Shall we commit harakiri for Senator LaFollette's benefit? Can we remain as we are, a sterile cancellation of the opposing forces? Does not our future depend on liberalizing the party, so that we can frame a creed of social justice, and nominate a candidate who can carry it out?

For the Democratic party to cease to exist would, I believe, be a national calamity. Any reasoned liberalism would be out of the question. The citizens would have to vote white, or red, or stay at home. We would have government by oscillation. There is real justification for a great constructive liberal party in America, such as were the Democrats during Mr. Wilson's first administration.

The Democratic party cannot be static. If the thoroughly discredited present control continues, it will quickly wane from its present minor, but yet substantial, power to a mere Southern bloc.

The wet-boss-reactionary veto has made our party organization odious. Its perpetuation will only accelerate our present rush to ruin.

The liberalization of the party is by no means impossible. It involves a twofold task: revising the party's internal machinery; and then advancing a creed of social justice. This latter task calls for a Jefferson, Lincoln, or Wilson. Undoubtedly some great figure will come forward to carry it out. I would not venture even to suggest an outline of such a program. The freeing of the party from its throttling ties, however, is fundamentally a simple task, the methods of which can be indicated.

The one-third rule (usually miscalled the two-thirds rule) is the bulwark of the disproportionate power of the wet-boss-reactionary alliance. Through this one-third rule any group (usually the reactionaries) which can weld together a third of the convention can thwart the will of the majority, exhaust them, and then enforce its own designs. Yet the Democratic party can be made democratic through a few modifications of its present convention rules. These are adopted not by a two-thirds vote, but by a simple majority. Each convention adopts its own rules. It is the guardian of its own destiny. If enough States send to the next national convention delegations pledged to vote for majority nomination of the Presidential, and vice-presidential candidates, the one-third rule will fade to that limbo of oblivion where it has belonged ever since 1832, when Andrew Jackson, out of hatred of John C. Calhoun, imposed the rule on the national convention to prevent Calhoun's renomination for vice-president.

The one-third rule might well be accompanied into the discard by the unit rule, but abolition of the latter is a proper function of each individual State, instructing its own delegation, and the national convention itself has no inherent power over it. I think it likewise is outworn, but its demise is unessential, while that of the one-third rule is necessary for the life of the party. Its death would emasculate boss control. The West and South could enforce a liberal program, and nominate a progressive candidate. The Democratic party again could be dedicated to public service.

12. WHY A THIRD PARTY?[1]

The opposition which developed at the recent meeting in Washington of representatives of the Conference for Progressive Political

[1] Reprinted from the *New Republic,* January 7, 1925, by permission of the publishers.

Action to the immediate organization of a third party was to be expected. Many times in recent American politics the progressives have during the excitement and enthusiasm of a presidential campaign cherished lively expectations of the subsequent organization of a third party which would be sufficiently strong to contest a national election with the two old parties, but with equal regularity most of the leaders, who during the turmoil of election appeared to favor a third party, later turned either indifferent or hostile. So it now is. It did not require three months ago any unusual shrewdness to predict that as soon as the voting was over and the decision digested, the enthusiasm for a third party would begin to evaporate. This evaporation would have taken place even if LaFollette had polled twice as many votes as he did. The obstacles to the formation of a third party are associated with some fundamental characteristics of American political institutions and traditions and American economic and social life.

The interesting letter of Mr. C. A. Sorensen, published elsewhere in this issue, indicates what form the point of view of a practical politician some of these obstacles are. Mr. Sorensen believes apparently with sufficient reason that in Nebraska progressivism, unless it is labelled Republican, has no chance of winning elections. A progressive like Senator Norris running as a Republican is easily victorious. A progressive like LaFollette, running as the candidate of a third party, is overwhelmingly defeated. The voters will support a progressive who is also a Republican, but they will not support a progressive who is not a Republican except occasionally when he happens to be a Democrat. If a progressive proposes to get elected in that part of the country, he must wear either one party label or the other. According to Mr. Sorensen, consequently, the way to make progressivism count in American politics is to dedicate the energy, money and enthusiasm which would be wasted in organizing a third party to winning and keeping control of the Republican party machine.

From the point of view of local practical politics, Mr. Sorensen's contention obviously has a great deal of force. It explains the extreme reluctance of progressives who occupy a position of prominence in either party to abandon their Republican or Democratic allegiance. All active politicians, progressive or the reverse, are primarily interested in electing themselves and other people to office; and at the present moment one of the two old party labels is almost indispensable to success in any local election. Political leaders like Senators Brookhart and Norris, who have little in common with their colleagues in the Republican party, find it necessary to remain

Republican, and Senator Wheeler, who as a Progressive candidate for Vice-President did what he could to discredit the Democratic party, announces himself, as soon as the campaign is over, once more a Democrat. Senator LaFollette himself has an extremely difficult decision to make. If he consents to resume the name of Republican, he can presumably continue to control the political destinies of Wisconsin, where as if he repudiates all allegiance to Republicanism and calls his local organization by some other name, as for the present he must and will, it will be more difficult for his machine to retain its existing supremacy in Wisconsin politics.

The reasons which Mr. Sorensen has advanced in favor of keeping progressive political agitation either Republican or Democratic are from the point of view of the practical politician unanswerable. If the paramount desideratum in American politics is to win local elections, a third party is an undesirable venture. But practical politics does not consist merely in winning the next election. It is because the New Republic does look at practical politics from a different angle that we consider the organization of a third party indispensable to the increasing power in American political life of a progressive outlook. Yet we agree with Mr. Sorensen that the kind of politicians who operate the existing party machinery, no matter whether they are progressive or conservative, will never have the patience and the faith to organize a third party. They will rally to it fast enough after it becomes powerful and try to make it as much like the existing parties as possible, but they will never take the risks nor know how to use the methods which are necessary to the creation of a partizan instrument of progressivism.

Where we differ from Mr. Sorensen is in our interpretation of the kind of party organization which is prepared to promote the success in politics of a progressive economic program. He compares the fabrication of a new party machine to the building of a second or a third railroad when one or two existing lines are fully competent to handle the traffic. It is more economical, he says, to take possession of an existing railroad and place good progressives on the board of directors. But the difficulty is that a political party, either conservative or progressive, is not or should not be merely a piece of machinery. It should to a certain extent form a community. The members of a party should possess a foundation of common interests and purposes. A voter who enrolls as a Republican should consider himself in substantial agreement with other Republicans about the kind of government which he would prefer for himself and his fellow countrymen. By enrolling as a Republican and sharing in a Republican primary, a conscientious man assumes some responsibility

for the welfare of the party and for the actions and opinions of his associates. He should be willing to make substantial concessions in order to coöperate with his fellow Republicans. If this is true, why should a progressive, who believes that the public welfare demands a thorough-going revision in the existing distribution of political and economic power, associate himself with a party which contains almost all of his conservative and reactionary fellow countrymen? If he and his progressive comrades should succeed in capturing the party organization, the conservatives would in the long run themselves secede or become Democratic.

Mr. Sorensen is arguing the question wholly from the point of a temporary condition in the politics of Nebraska and other western states. It so happens that in Nebraska, Iowa and the like, certain progressive leaders who would be defeated on a third party ticket can be elected as Republicans and he considers it of greater importance for progressive voters to remain Republican in order to keep men like Senator Norris in the Senate than to compromise Mr. Norris's future success by organizing a temporary third party. But, desirable as it is to elect Senators such as Norris and Brookhart, they and their fellow progressives will after their election form a small minority in Congress, and without the support of a national party, they can never become anything like a majority in Congress. The conditions in the Eastern and Middle Western states differ sharply from those which prevail in Nebraska. In many Eastern and Middle Western states the majority of progressively inclined voters are as or more likely to be Democratic than Republican. In these states the great majority of Republicans are conservative. New York progressives who enrolled as Republicans in the hope of electing progressives to office would be comparable to a man who enrolled in the army of Napoleon in the hope of contributing to peace on earth. Republicanism in Nebraska may be and doubtless is more progressive than Republicanism in the East, but if so, as Mr. Sorensen himself declares, the Nebraska Republicans will remain progressive only by dissociating themselves from Republicans in other states. They would be secessionists within the party and in the end would, if successful, merely promote political confusion by preventing both conservatism and progressivism from creating trustworthy partizan instruments of government.

For many years now the two older parties have been steadily changing into coalitions of economic or sectional groups which possessed little unity of purpose, interest or conviction. They are machines for selecting and electing candidates for office, which in the event of victory are not sufficiently united to agree upon an effective common

course of action. Since the Republicans returned to power in 1921, they have found it almost impossible to legislate upon domestic economic and political problems. Dissensions within their ranks paralyzed their efforts. Still sharper conflicts almost split the Democratic party during the sessions of its last national convention. In the end the Democracy was obliged to sacrifice its momentum as a party to a merely formal unity by nominating a middle-of-the-road candidate in whom neither conservatives nor progressives could take any positive interest. When and how the Democratic party will regain its vitality is a matter of guess work, but in the meantime the Republican party has developed in a direction which will make the situation of progressives who try to remain with the Republican party ridiculous. Under President Coolidge's leadership it is coming to be less of an unprincipled machine and more of a political community, but it is a community which is consciously conservative, and which is tending to exclude progressives from its ranks as heretics and traitors.

For our part we devoutly hope that hereafter the Republicans will come to be more rather than less consciously and intelligently conservative. In that case it will be possible and comparatively easy to build up gradually a consciously progressive opposition party which will offer to the voters a positive alternative to Republican conservatism. But a progressive party will never be organized and populated by leaders who consider that the most important objective of progressive politics is the electing of the more progressive of two candidates to office. The substance of the new organization will have to be voters who believe that the existing economic system deprives them of any sufficient power over their welfare and who are convinced that they will never obtain this power until they create a partizan instrument under their own control. A progressive party composed of such raw material could depend upon a motivation no less strong than that of the conservatives for sticking together and for educating themselves to carry out their task. An attempt will be made early in 1925 to organize the LaFollette voters into the beginnings of such a party. It may not be attended with much immediate success. It is doubtful whether there are at present a large enough number of American workers who are mentally prepared to support a workers' party. But they are steadily increasing, and sooner or later they will plan and build the necessary machinery. Until they do American progressives will have to struggle along without the protection and the comfort of an appropriate and weatherproof home. They may be obliged to live from hand to mouth and occupy for a few months at a time any available

shelter. This they are in the circumstances fully justified in doing, but they are not justified in confusing such political subterfuges with a satisfactory organization of progressive politics. If a redistribution of political and economic power is as desirable, in fact as urgently demanded, as progressives think it is, and if national parties are indispensable agencies of American government, then sooner or later out of the sheer necessities of the situation there will arise a national progressive party.

Beard, (4th Ed.), pp. 125–162.
Kimball, *National Government*, pp. 82–139.
Ogg and Ray, (2nd Ed.), pp. 567–594.

IV

THE NOMINATION AND ELECTION OF A PRESIDENT

Once in four years the country is stirred and the pent-up emotions of the people are unloosed while they go through the highly emotional job of nominating candidates and electing a President. The framers of the Constitution had no such intentions, and the creation of their minds, the Electoral College, has failed to serve the purpose which they had in view. The nominating convention with the blare of bands, the waving of flags, the secret conferences of leaders, and the jockeying for position has become a rallying-point for the party, or in some instances has destroyed party unanimity. The preliminary campaign for delegates begins months before the convention, and the activity continues until Congress has officially declared a President and Vice-President elected. The whole procedure requires fifteen months from the issuance of the call of the convention in December or January before election. The pre-convention campaign has increased in importance with the adoption of presidential primary laws, and the expenditure of vast sums in the securing of instructed delegates is not unusual. The conventions hold public interest for weeks; their dramatic action, keynote speeches, cheering, etc., has been presented vividly to the voter by press and radio. The campaign develops slowly and gathers momentum through September and October, until radio, press, discussion, lecture platform, and often pulpit are dominated by thoughts of election. The party organizations reach their maximum efficiency, and election day is one of breathless suspense. Radio reports, newspaper extras, and illuminated screens announce the results, and the morning papers give the final judgment of the voters. The suspense is over; the country accepts the verdict and goes back to its daily work. The defeated candidate takes a vacation, and the victor begins his great task of making appointments and preparing for his still greater task of governing the country.

13. THE CALL FOR THE DEMOCRATIC NATIONAL CONVENTION

Washington, D. C., January 24, 1924.

TO WHOM IT MAY CONCERN:

By Authority of the Democratic National Committee, a National Convention of the Democratic Party is hereby called, to meet in the city of New York, in the State of New York, on the 24th day of

June, 1924, at 12 o'clock noon, for the purpose of nominating a candidate for President and a candidate for Vice-President of the United States, to promulgate a Party platform, and to take such other action as may be deemed advisable. Delegates and alternates from each State shall be chosen to the number of two delegates and two alternates for each United States Senator and two delegates and two alternates for each Representative in Congress from the respective States; and the District of Columbia, the Philippines, Hawaii, Porto Rico, Alaska, and the Canal Zone shall be entitled to six delegates and six alternates each.

In accordance with the action taken by the Democratic National Committee in authorizing the issuance of this call, it is provided that no state, territory or district shall elect any number of delegates with their alternates in excess of the quota to which such state, territory or district may be entitled under the basis of representation herein indicated.

In authorizing this call the Democratic National Committee further provided that in order that opportunity may be afforded the various states to give adequate representation to women as delegates-at-large, without disturbing prevailing party custom, there may be elected from each state four delegates at large for each Senator in Congress from such state, with one-half vote each in the National Convention, and recommended to the states that one-half of the number of delegates at large shall be women.

(Signed) Cordell Hull, Chairman."

14. THE CALL FOR THE REPUBLICAN NATIONAL CONVENTION

Washington, Dec. 12, 1923.

TO THE REPUBLICAN VOTERS OF THE UNITED STATES:

In pursuance of the rules adopted by the Republican National Convention of 1920, the Republican National Committee directs that a National Convention of delegated representatives of the Republican Party be held in the City of Cleveland, in the State of Ohio, at eleven o'clock, a. m., on Tuesday, the 10th day of June, 1924, for the purpose of nominating candidates for President and Vice-President, to be voted for at the Presidential Election on Tuesday, November 4, 1924, and for the transaction of such other business as may properly come before it.

The voters of the several States and of Alaska, Hawaii, Porto Rico, the Philippine Islands and the District of Columbia who are in

accord with the principles of the Republican Party, believe in its declaration of policies, and are in sympathy with its aims and purposes, are cordially invited to unite under this call in the selection of Delegates to said Convention.

Said National Convention shall consist of

(a) DELEGATES AT LARGE

1. Four Delegates-at-Large from each State.

2. Two additional Delegates-at-Large for each Representative-at-Large in Congress from each State.

3. Two Delegates-at-Large each for Alaska, District of Columbia, Porto Rico, Hawaii, and the Philippine Islands.

4. Three additional Delegates-at-Large from each State casting its electoral vote, or a majority thereof, for the Republican nominee for President in the last preceding Presidential election.

(b) DISTRICT DELEGATES

1. One District Delegate from each Congressional District.

2. One additional District Delegate from each Congressional District casting 10,000 votes or more for any Republican elector in the last preceding Presidential election or for the Repubican nominee for Congress in the last preceding Congressional election.

(c) ALTERNATE DELEGATES

One Alternate Delegate to each Delegate to the National Convention.

Delegates Shall Be Elected Under the Following Rules:

FIRST: Only legal and qualified voters shall participate in a Republican primary, caucus, mass meeting, or mass convention, held for the purpose of selecting delegates to be elected as delegates to County, District or State Conventions, and only such legal and qualified voters shall be elected as delegates to County, District and State Conventions.

SECOND: State and District Conventions shall be composed of delegates who are legal and qualified voters. Such delegates shall be apportioned among the counties, parishes and cities of the State or District, having regard to the Republican vote therein.

THIRD: Delegates and Alternates to the National Convention shall be duly qualified voters of their respective States and Territories, and in the case of the District of Columbia, residents therein.

Delegates-at-Large and their Alternates, and Delegates from Congressional Districts and their Alternates, shall be elected in the following manner:

(1) By primary election, in accordance with the laws of the State in which the election occurs, in such States as require by law the election of Delegates to National Convention of political parties by direct primaries; provided, that in any State in which Republican representation upon the board of judges or inspectors of elections for such primary election is denied by law, Delegates and Alternates shall be elected as hereinafter provided.

(2) By Congressional or State Conventions, as the case may be, to be called by the Congressional or State Committees, respectively. Notice of the call for any such convention shall be published in a newspaper or newspapers of general circulation in the District or State, as the case may be, not less than fifteen days prior to date of said Convention.

(3) Provided, however, that in selecting Delegates and Alternates to the National Convention, no State law shall be observed which hinders, abridges, or denies to any citizen of the United States eligible under the United States Constitution to the office of President or Vice-President the right or privilege of being a candidate under such state law for the nomination for President or Vice-President; or which authorizes the election of a number of Delegates or Alternates from any State to the National Convention different from that fixed in this call.

In a Congressional District where there is no Republican Congressional Committee, the Republican State Committee shall issue the call and make said publication.

All Delegates from any State may, however, be chosen from the State at large, in the event that the laws of the State in which the election occurs so provide.

Alternate Delegates shall be elected to said National Convention for each unit of representation equal in number to the number of Delegates elected therein and shall be chosen in the same manner and at the same time the Delegates are chosen; provided, however, that if the law of any State shall prescribe the method of choosing Alternates, they shall be chosen in accordance with the provisions of the law of the State in which the election occurs.

The election of Delegates and Alternates from Alaska, Hawaii, Porto Rico, the Philippine Islands and the District of Columbia

shall be held under the direction of the respective recognized Republican Central Committee or governing committee therein, in conformity with the resolution this date adopted by the National Committee, copies of which resolution will be furnished to the governing committee of the Republican Party in each of such units of representation by the Secretary of the National Committee.

All Delegates or Alternates shall be elected not earlier than thirty days after the date of this call and not later than thirty days before the date of the meeting of said Republican National Convention unless otherwise provided by the laws of the State in which the election occurs.

No Delegates or Alternates shall be deemed eligible to participate in any convention to elect Delegates to said National Convention who were elected prior to the date of this call.

The credentials of each Delegate and Alternate elected must be forwarded to the Secretary of the Republican National Committee at the office of the National Committee, Munsey Building, Washington, D. C., at least twenty days before the said 10th day of June, 1924, for use in making up the temporary roll of the Convention; except in the case of Delegates or Alternates elected at a time or times in accordance with the laws of the State in which the election occurs, rendering impossible the filing of credentials within the time above specified.

All notices of contests shall be forwarded in the same manner and within the same time limit. When more than the authorized number of Delegates or Alternates from any State, Territory or Territorial possession are reported to the Secretary of the National Committee, a contest shall be deemed to exist and the Secretary shall notify the several claimants so reported and shall submit all such credentials and claims to the whole Committee for decision as to which claimants reported shall be placed on the temporary roll of the Convention; provided, however, that the names of Delegates and Alternates presenting certificates of election from the canvassing board or officer created or designated by the law of the State in which the election occurs, to canvass the returns and issue certificates of election to Delegates to National Conventions of political parties in a primary election, shall be placed upon the temporary roll of the Convention by the National Committee.

All notices of contests shall be submitted in writing, accompanied by a printed statement setting forth the ground of the contests, and

must be filed with the Secretary of the National Committee at least twenty days prior to the meeting of the National Convention, except in the case of Delegates or Alternates elected at a time or times in accordance with the laws of the State in which the election occurs, rendering impossible the filing of notices of contests within the time above specified.

The Secretary of the Republican National Committee is directed to promulgate this call by sending a copy thereof to the member of the National Committee from each State, Territory, Territorial possession and the District of Columbia, and to inclose therewith copies of the call for the Chairman and Secretary of the State Central Committee or governing committee of the party therein to be forwarded to said Chairman and Secretary by the member of the National Committee.

The Apportionment of Delegates to Said National Convention, in Accordance with a Resolution Adopted by the Republican National Committee in Washington, December 12, 1923.

ALABAMA.....	4 Delegates-at-Large; 2 Delegates each from the 7th and 10th Congressional Districts; 1 each from other Districts—total 16.
ARIZONA.....	9 Delegates-at-Large.
ARKANSAS.....	4 Delegates-at-Large; 2 each from the 3d, 4th and 5th Congressional Districts; 1 each from the 1st, 2nd, 6th and 7th Congressional Districts —total 14.
CALIFORNIA.....7	Delegates-at-Large; 2 from each Congressional district—total 29.
COLORADO.....	7 Delegates-at-Large; 2 from each Congressional District—total 15.
CONNECTICUT.....	7 Delegates-at-Large; 2 from each Congressional District—total 17.
DELAWARE	9 Delegates-at-Large.
FLORIDA	4 Delegates-at-Large; 2 each from the 1st and 4th Congressional Districts; 1 each from the 2d and 3d Congressional Districts—total 10.
GEORGIA	4 Delegates-at-Large; 2 each from the 7th and 9th Congressional Districts, and 1 Delegate each from the other Districts—total 18.

IDAHO	7 Delegates-at-Large; 2 from each Congressional District—total 11.
ILLINOIS	11 Delegates-at-Large; 2 from each Congressional District—total 61.
INDIANA	7 Delegates-at-Large; 2 from each Congressional District—total 33.
IOWA	7 Delegates-at-Large; 2 from each Congressional District—total 29.
KANSAS	7 Delegates-at-Large; 2 from each Congressional District—total 23.
KENTUCKY	4 Delegates-at-Large; 2 from each Congressional District total 26.
LOUISIANA	4 Delegates-at-Large; 2 Delegates from the 2d Congressional District; 1 Delegate each from the other Congressional Districts—total 13.
MAINE	7 Delegates-at-Large; 2 from each Congressional District—total 15.
MARYLAND	7 Delegates-at-Large; 2 from each Congressional District—total 19.
MASSACHUSETTS	7 Delegates-at-Large; 2 from each Congressional District—total 39.
MICHIGAN	7 Delegates-at-Large; 2 from each Congressional District—total 33.
MINNESOTA	7 Delegates-at-Large; 2 from each Congressional District—total 27.
MISSISSIPPI	4 Delegates-at-Large; 1 from each Congressional District—total 12.
MISSOURI	7 Delegates-at-Large; 2 from each Congressional District—total 39.
MONTANA	7 Delegates-at-Large; 2 from each Congressional District—total 11.
NEBRASKA	7 Delegates-at-Large; 2 from each Congressional District—total 19.
NEVADA	9 Delegates-at-Large.
NEW HAMPSHIRE	7 Delegates-at-Large; 2 from each Congressional District—total 11.
NEW JERSEY	7 Delegates-at-Large; 2 from each Congressional District—total 31.
NEW MEXICO	9 Delegates-at-Large.
NEW YORK	7 Delegates-at-Large; 1 each from the 12th and 13th Congressional Districts; 2 from each of the other Districts—total 91.

NORTH CAROLINA .. 4 Delegates-at-Large; 2 Delegates each from the 3d, 4th, 5th 6th, 7th, 8th, 9th, and 10th Congressional Districts; 1 Delegate each from the 1st and 2nd Congressional Districts—total 22.

NORTH DAKOTA .... 7 Delegates-at-Large; 2 from each Congressional District—total 13.

OHIO ..... 7 Delegates-at-Large; 2 from each Congressional District—total 51.

OKLAHOMA..... 7 Delegates-at-Large; 2 from each Congressional District—total 13.

OREGON ..... 7 Delegates-at-Large; 2 from each Congressional District—total 13

PENNSYLVANIA..... 7 Delegates-at-Large; 2 from each Congressional District—total 79.

RHODE ISLAND ..... 7 Delegates-at-Large; 2 from each Congressional District—total 13.

SOUTH CAROLINA .. 4 Delegates-at-Large; 1 from each Congressional District—total 11.

SOUTH DAKOTA..... 7 Delegates-at-Large; 2 from each Congressional District—total 13.

TENNESSEE..... 7 Delegates-at-Large; 2 from each Congressional District—total 27.

TEXAS ..... 4 Delegates-at-Large; 2 from the 14th Congressional District; 1 from each of the other Districts—total 23.

UTAH ..... 7 Delegates-at-Large; 2 from each Congressional District—total 11.

VERMONT..... 7 Delegates-at-Large; 2 from each Congressional District—total 11.

VIRGINIA ..... 4 Delegates-at-Large; 2 each from the 5th, 7th and 9th Congressional Districts; 1 each from the other Congressional Districts—total 17.

WASHINGTON ..... 7 Delegates-at-Large; 2 from each Congressional District—total 17.

WEST VIRGINIA..... 7 Delegates-at-Large; 2 from each Congressional District—total 19.

WISCONSIN..... 7 Delegates-at-Large; 2 from each Congressional District—total 29.

WYOMING ..... 9 Delegates-at-Large.

ALASKA..... 2 Delegates-at-Large.

DISTRICT OF
COLUMBIA..... 2 Delegates-at-Large.
HAWAII..... 2 Delegates-at-Large.
PHILIPPINES ..... 2 Delegates-at-Large.
PORTO RICO..... 2 Delegates-at-Large.
Total Number of Delegates..... 1,109.

George B. Lockwood,
Secretary.

John T. Adams,
Chairman.

Washington, D. C.,
December 12, 1923.

15. THE PRESIDENTIAL PRIMARY[1]

By Ralph S. Boots

INTRODUCTION

The national conventions perform a function of extreme importance to the people of the nation. They select the two men from whom the voters select the president. But they are absolutely free from national regulation. Here is a strange situation. The constitution declares that congress may at any time make or alter regulations for the election of congressmen, but provides for the election of president that "each state shall appoint in such manner as the legislature thereof may direct, a number of electors. . . ." Thus the states seem to have complete control ever the election of the members of the electoral college within their respective boundaries. The discretionary power of this body between the voters and the president has long since disappeared.

National conventions, on the other hand, have retained their discretionary power and remained a law unto themselves. With an understanding of the principles of the transmission of political power, the people have attempted within the past decade to remove all unnecessary intermediate belts and cogs between themselves and their agents, the party candidates for president. They are not satisfied to take one or the other of two candidates submitted to them by the politicians. The means devised to allow popular wishes directly to determine the nomination of the president is the so-called presidential primary. It is provided solely by state law, party because of the constitutional provision that the presidential electors should be chosen by the states, and

[1] Reprinted from the *National Municipal Review* with the consent of the author and editor.

partly because of the position of the states in the party system. The laws of no two states are exactly alike, but there are, however, two chief forms: one provides for the direct election of the delegates to the national conventions; the other gives the opportunity to the voters to express a preference among the aspirants for the nomination who have complied with the state regulations for getting their names on the ballot. The terms presidential primary and presidential preference primary have been popularly applied to both forms. It is preferable not to use the latter term except for the latter form. Most states employing the presidential primary combine these forms. The former alone is not a direct primary at all, but takes on the appearance of directness in proportion as provisions are made for allowing or requiring the candidates for delegate to pledge themselves to support some particular aspirant for the nomination. The preference vote under the latter form does not count directly for any aspirant but only indirectly through the vote of the delegates in the convention, and hence is in the nature of an instruction more or less binding.

In 1912 the laws of twelve states provided for some form of the presidential primary. These states were entitled to 360 delegates in the conventions, about one third of the total. In 1916 twenty states compelled the use of the primary; the Republican convention included 581 delegates from these states, and the Democratic, 584. In 1920 two additional states [2] required the presidential primary and two had discarded it—Iowa and Minnesota in 1917 after a single experience of its operation. It is reported that Iowa considered the law useless and expensive—the primary cost $129,000. Minnesota voters are said to have been disgusted by their inability in 1916 to vote for Roosevelt, who did not become a candidate in the primary. Florida, Alabama and Georgia have permissive presidential primary provisions.

The delegates to San Francisco in 1920 from primary states (not territories) numbered 638. To the Chicago convention this year 569 delegates were elected from primary states.

How far have these state laws been effective in substituting a direct for an indirect nomination of presidential candidates? To answer this question requires first a brief analysis of the state laws and their operation.

[2] North Carolina and West Virginia. The North Carolina law seems to have been passed in 1915. The Legislative Reference Library states no presidential primary was held in 1916. The West Virginia State Historian and Archivist reports that a presidential primary was held in 1916.

STATE PRIMARY LAWS SUMMARIZED

California. Presidential primary held the first Tuesday in May; regular state primary, last Tuesday in August. The preference vote was discarded after 1916. Delegates elected at large. The candidates for delegate may be grouped, provided each group contains from two to four members from each congressional district. Each group must have the endorsement of the candidate for president for whom the members of the group have filed a preference, or of a state organization not repudiated by him. Each candidate for delegate may file a statement declaring his preference and promising to support this preference to the best of his ability. Neglect to file the statement does not keep a candidate's name off the ballot but does keep the names of a group off the ballot or prevent a candidate's name from appearing in a group. Each voter is given the ballot of the party with which he declares it is his intention to affiliate, and is sent the sample ballots of all parties. The author of the act specifically states that election at large was provided partly to increase the political influence of the state. The Republican primary vote this year was almost one fourth larger than the general election vote for Hughes in 1916. The Democratic vote was one twentieth the last vote for Wilson. This indicates the voting of a large number of Democrats in the Republican primary.

Indiana. First Tuesday after the first Monday in May. At the same time comes the regular state general primary. The voters casts a preference vote for president and elect delegates from each county to the state convention, which in turn chooses the national delegates. Party rules may permit the delegates from each congressional district to select the national district delegates. The Republican party uses this method. In case an aspirant receives a majority of the party vote the delegates are considered instructed and it becomes their duty to cast their votes as a unit for such candidate as long as his name is before the convention. The voter is given any party's ballot that he requests unless challenged, when he must make affidavit that at the last election he voted for a majority of the candidates of that party. It will be observed here that if no candidate polls a majority vote, the law's only effect is to govern the election of the state convention. At the last primary, Wood had the largest vote in nine congressional districts and Johnson the highest vote in the other four, but the Republican organization, favorable to Harding, succeeded in electing most of the delegates to the state convention. Of the 26 district delegates, 6 were instructed for Wood and 4 for Johnson at the state convention. Three

of the four delegates at large were personally opposed to Wood but instructed to vote for him as long as he had a fair chance to be nominated. It was understood that not more than one delegate of the thirty was really for Johnson. On the first two ballots in the national convention the delegates voted as the preference pluralities in the state and districts went. On the third ballot delegates began to leave Wood and Johnson. The *Indianapolis News* asserted that scores of Democrats asked for and voted Republican ballots in the Indianapolis precincts with the result that in many cases the "Republican" primary vote exceeded the Republican vote for secretary of state two years before.

Illinois. Third Tuesday in April. State primary the Wednesday after the second Tuesday in September. Preferential vote and direct election of district delegates. Precinct committee men are elected who select delegates to the state convention which chooses the national delegates at large. The vote for president has for its sole purpose an expression of the sentiment of the party voters and the vote of the state at large is considered advisory to the delegates at large and that of the congressional district to the district delegates. Each candidate for delegate is required to file a statement of his choice for president or a statement that he has no choice. A candidate for president may disavow the candidacy of a person who designates him as a choice and prevent that person's name from appearing on the ballot. The voter at the primary must declare his party affiliation and must not have voted at the primary of any other party for two years. The Illinois law permits the possibility that the state preference will favor one candidate, that the majority of the district delegates will favor another, and that the state convention will favor a third.

Maryland. First Monday in May. At the same time nominations for United States representatives and for all offices to be filled at the presidential election are made, but on other than presidential years the state primary comes between the eighth and fifteenth of September. The Maryland primary is quite unique. There is a preference vote for president but delegates to the national convention are elected by a state convention whose members are chosen by direct vote at the presidential primary. The preference vote is counted separately in each county, and in instructing the national delegates, the delegations from these areas are required to vote at the state convention, in accordance with the preference of the voters in their respective counties, as long as there is any possibility of such preference obtaining a majority of the vote n the convention, and as long as this preference receives the vote of any nine counties. Delegates to the national convention are instructed for the candidate

receiving the majority vote of the state convention and are bound to support him as long as there is possibility of his nomination. If there is no presidential candidate in the primary the state convention may instruct for whom it pleases or not at all. At the primary the voters are given the opportunity to vote for an uninstructed delegation in the same manner as for a candidate, with the same effect on the delegates to the state convention. A presidential aspirant must pay a fee of $25 for each county in which his name is to appear on the ballot. Party registration is required.

Massachusetts. Last Tuesday in April. State primary six weeks before the fall election. Delegates to the national convention are directly elected by districts and at large, the distribution being determined by the state committees, provided each district elects at least one delegate. Candidates for delegate may have their names printed in groups and a single mark will count for the group. The secretary of state certifies the preference vote to the state committees. There is apparently no provision to make the state or district preference votes effective or binding. It seems that the delegate's preference for president may be printed after his name on the ballot. There is no assurance that the preference vote and the vote for pledged delegates will correspond or that the delegates at large and the district delegates will favor the same candidate. What happened in 1912 may happen again; no effort seems to have been made to prevent it. In 1916 an act was passed to confine voters to the primary of their own party by an enrollment scheme. The *Boston Transcript* gives two reasons for the apathy of the voters this year: first, their conviction that the candidates for delegate were insincere in their professions of support for the different presidential aspirants and their resentment at the interference of the state committees; second, the inconclusiveness of the Massachusetts system which afforded no opportunity for a direct vote on presidential aspirants since no one had filed a petition and in only six of the sixteen districts had the candidates for delegate announced themselves favorable to Wood. Editorially the *Transcript* charges that the primary law enables the candidate for delegate to prostitute the popularity of presidential possibilities to his own political aggrandizement and often leaves the voter ignorant of his would-be delegate's principles and choice for president.

Michigan. First Monday in April. State primary last Tuesday in August. The law is brief, providing only a preference vote for nominee and national committeeman. Only 100 voters need sign the candidate's petition. The candidate receiving the highest vote is declared to be the choice of the party for the state. The law seems

to allow the voters full choice of party, by requiring that he shall be "furnished a ballot," presumably that of any party he likes. The choice of delegates is left entirely to the party regulations. Although Johnson this year received a large plurality in the state, Wood carried eight of the thirteen congressional districts and his backers contended that the state convention should leave the way open for a change to him after the delegation had discharged its obligation to Senator Johnson on the first ballot. The state convention, according to the *Detroit Free Press,* chose three of the four delegates at large opposed to Johnson. The delegation stood solidly for Johnson until the sixth ballot.

Montana. Forty-fifth day before the first Monday in June. State primary seventy days before the fall election. Preference vote and direct election of delegates on a general ticket. The names are arranged alphabetically and the voter votes for the state's quota. Presidential aspirants are designated for the primary by petitions of their personal supporters in Montana without themselves signing any petition or acceptance. Each delegate is paid his expenses, not to exceed $200, and must take an oath of office that he will to the best of his judgment and ability faithfully carry out the wishes of his political party. Candidates for the presidential nomination may use the official campaign book on payment of a fee. Montana has the "open" primary. The voter is handed the ballots of all parties, from which he selects the one he wishes to use. Statutes passed by the last legislature providing the "closed" primary and the rotation of the names on the ballot were held up by a referendum petition.

Nebraska. Third Tuesday in April. General state primary. In other than presidential years state primary third Tuesday in August. Four delegates at large and two from each district and the national committeemen are directly elected. There is also a preference vote. Presidential aspirants are designated, without acceptance on their part, by petitions containing 500 names in each congressional district. No provision exists for putting delegates on record for any candidate nor for binding them to support the candidate of highest vote in the state, and a court decision indicates that the delegates are only morally bound by the preference vote. Senator Johnson has publicly attacked what he calls the perfidy of the Nebraska delegation. A voter at the primary must state his party affiliation and, except in cities where registration is required, may state any party he pleases subject to a challenge on the ground of party membership to be satisfied by an oath as to his intention. A good authority declares that thousands of Democrats voted in the Republican primary this year.

New Hampshire. Second Tuesday in March. This is the earliest

presidential primary. State primary first Tuesday in September. Delegates are directly elected—at large and by districts. There is no preference vote, although a candidate for delegate may have printed after his name the words: "Pledged to vote for the nomination of —— for president." The state committee may fill vacancies in the list of candidates for delegate if fewer than the state's quota file petitions. If a voter's party membership has been registered he is limited to the primary of that party; if not, he may join any party subject to challenge and oath.

New Jersey. Fourth Tuesday in April. State primary fourth Tuesday in September. Direct election of delegates and preference of vote. Distribution of delegates is made by the state committee chairmen in accordance with the call of the national committee. Candidates for delegates may be grouped and have the name of the presidential candidate they favor placed opposite the group or opposite individual names under the caption, "Choice for President," or any six word slogan may be used. Voters are confined to the party in the primary of which they voted the preceding year. The secretary of state is required publicly to announce the preference vote, apparently only for the state as a unit. There is no attempt in the law to bind any delegate either by the vote of his district or the vote of the state or by his own expressed preference. The delegate must decide what he will do. The practice in New Jersey seems to have been for the delegate at large to feel bound by the state preference vote and the district delegate by the district preference, although in 1912 four anti-Wilson delegates from Essex county supported Clark to the last ballot regardless of the fact that Wilson's name alone was on the ballot. There is a stringent act on election expenditures broad enough in terms to cover the presidential primary. The amount spent in aid of the candidacy of a delegate is specifically limited to $5,000. This limitation would permit a presidential candidate or his friends to spend $140,000 in the state.

The party and public offices held by the delegates of this year will be of interest. Of the Republicans, two were United States senators, one chairman of the state committee and ex-governor, one ex-governor and state senator, two state senators, one county clerk, one county chairman and mayor, two judges, four members of the advisory committee to the chairman of the Essex county committee. Of the twenty-eight Democrats, one was governor, one ex-state committeeman and member of the Essex county committee, two United States representatives, one chairman of a county committee, three state committeemen, four mayors of leading cities, one county clerk, two state senators, one collector of internal revenue, one

leader of last session of assembly, two city commissioners of two largest cities in the state, one member of a county executive committee, and one member of a state commission. After the Republican convention some of the New Jersey papers attempted to indicate which five delegates voted for Senator Harding. In the absence of a poll of the delegation there seems to be no means of putting a national delegate on record in the exercise of his most important function.

New York. First Tuesday in April. State primary seventh Tuesday before fall election. Delegates are directly elected, not more than four at large. There is no preference vote and no provision for a delegate to indicate on the ballot his choice for president. Designating petitions for delegate at large must contain 3,000 signatures and for district delegate, 500. There is a strict party enrollment law.

The details of the New York primary of this year are instructive. The primary was held on April 6. In the *New York Times* of February 4 appeared the statement that the Democratic state committee would hold a meeting to consider the calling of an unofficial state convention for the proposal or endorsement of delegates at large and district delegates to the national convention. A letter to the Democratic state chairman asking for information on the composition of this convention and the method of selecting the members elicited no reply and the newspapers contain no account of an election of delegates. A district leader in New York county, however, vouchsafed the information that each state committeeman was entitled to attend the convention along with two persons whom he selected to accompany him. The Republicans also held an unofficial convention which had for its avowed purpose the adoption of a platform and the recommending of delegates at large to the Republican voters. The necessity or advantage of a platform at this time is hardly apparent to the naked eye. Elections to choose delegates to this convention were held, in New York city at any rate, at the various assembly district headquarters. A request by letter to the Republican state chairman for the vote for these delegates brought no response. The vote for delegate in the eleventh assembly district was printed in the *Times* as 126, the result of a contest which was apparently the single exception to complete harmony in the Manhattan caucuses. The Republican enrollment in the eleventh district in 1919 was 8,181. Party leaders stated that no significance attached to the selection of these delegates as far as the presidential situation was concerned.

To head off any trouble that might be started in the Republican

convention the state committee first named the "big four" delegates and alternates. At the Democratic convention a complete slate of delegates was proposed for "recommendation" to the voters. The "recommendation" was accepted with hardly a murmur of disapproval. In 39 of the 43 districts absolutely no choice among delegates was offered to the Democratic voter who went to the polls on April 6 out of a sense of civic duty. The organization candidates in the Republican primaries made a clean sweep. In only 16 of the 43 districts were there contests. Only one man contested the choice of the machine for delegate at large and he was a Hoover supporter. About a quarter of the Republican voters went to the polls and 15 per cent of the Democrats. Among the Democratic delegates were 23 state committeemen, district leaders or congressmen; among the Republican delegates were 33 persons of similar political positions while only 34 of the 88 delegates did not hold public or party office. The number of officials, party and public, who find places on the delegations is not really a matter of much moment because the preliminaries, if considered in connection with the result of the primaries, show that the state committee members could probably secure their election to the conventions to the number to which the state is entitled, if they chose to do so. The *Evening Post's* editorial on the primary was headed, "The Primary Vindicated": it asserted there could be no disappointment among friends of the primary over the way in which it had done what it was intended to do; that Governor Hughes never held it up as anything more than an opportunity for the effective expression of the will of the party voter. That the opportunity was very imperfectly realized this year would be the testimony of most intelligent voters, but the voters may have been responsible for the lack of opportunity. To state what principle or what candidate he was supporting in his vote for delegate would have been beyond the conjecture of the great majority of the voters.

North Carolina. First Saturday in June. Latest presidential primary. General state primary at the same time. Preference vote. All delegates at large and district delegates are held bound to support the candidate receiving the majority of the preference vote. If no candidate receives a majority, the plurality governs in each congressional district and in the state at large respectively. The intent of this provision is not very clear in the absence of interpretation. How far the delegate is "bound" by the preference vote is not indicated. There seems, as in the case of Michigan, to be no provision whatever for the election of the national delegates. A declaration and record of party membership is required of the voters before participation in the primary.

North Dakota. Third Tuesday of March. Regular state primary last Wednesday in June. Preference vote. Delegates are elected directly on a general ticket. Recommendation of a national committeeman by the primary vote. Each elector receives the ballot of the party with which he declares himself affiliated or with which he may have registered. Expenses of delegates to the national convention are paid to the amount of $200. Every delegate must subscribe an oath that he will to the best of his judgment and ability faithfully carry out the wishes of his party. The privilege of the publicity pamphlet does not seem to be available to the candidates for president and delegates.

Ohio. Last Tuesday in April. State primary second Tuesday of August. Preference vote. Direct election of delegates. The candidate for delegate must state his first and second choice for president with the consent of the presidential aspirants indicated. These choices appear with the candidate's name on the ballot. The candidate for delegate may also file a statement that he will support the candidate for president who receives the highest vote in the party. It does not appear whether this statement is printed on the ballot or whether the delegate is to support the choice of the state or of the district. The name of no candidate for president is to be submitted to the voters without his consent. Voters are restricted to the primary of their own party.

Oregon. Third Friday in May, general state primary. National delegates, four at large and two from each district, are directly elected, and also national committeemen. Preference vote. The declaration of candidacy of a delegate must contain his promise to use his best efforts to secure the nomination of the voters' preference. The delegate may file in a statement of 100 words the names of candidates or principles in which he especially believes, and may indicate the 12 words that he desires printed on the ballot. Both candidates for delegate and for the presidential nomination are entitled to use the official publicity pamphlet on payment of the fee. Voters are registered in their respective parties. It will be noticed that the state is the unit in the preference vote and that each delegate must pledge his support of the state wide preference. Oregon, like Montana, has given up the system of election at large in which each voter could vote for only one delegate. The result in Oregon in 1912 was the election of a mixture of LaFollette, Roosevelt, and Taft men pledged by the preference vote to Roosevelt. As a consequence, part of the delegation supported the movement which gave the Taft forces control of the convention, yet the present Oregon law by no means guarantees the selection of delegates honestly favorable to the state's preferred

candidate. All of the districts may not go as the state goes in preference; and further, due to the failure of some who vote a presidential preference to vote for a delegate, even the delegates at large may not personally desire the success of the state's favorite. This year although Johnson had a plurality of about 2,000, the avowed Johnson delegates were defeated and the manager of the Wood campaign was among the delegates elected.

Pennsylvania. Third Tuesday in May. Regular spring primary for all the candidates for offices to be filled at the general election. Fall primary, the third Tuesday in September, in odd years. Preference vote and direct election of delegates. In 1912 delegates at large were chosen at a state convention and no preference vote was provided for. The distribution of delegates is certified to the secretary of the commonwealth by the chairman of the state committees. After the names of all candidates for delegate there must be printed on the ballot one of two statements: that the delegate promises or does not promise to support for the presidential nomination with all fidelity in all matters coming before the convention the popular choice of his party in the state (if a delegate at large) or in the district (if a district delegate) according as he has or has not filed a statement of this promise. This year the name of only one candidate for the Republican preference vote was printed on the ballot, that of a retired business man of Philadelphia, Edward Randolph Wood. The result was somewhat disconcerting to those whose confidence in plebiscites is unshaken. Mr. Wood polled about 258,000 votes out of a total Republican preference vote of 279,000. Some 3,900 voters wrote in the name of Leonard Wood. Just what was in the minds of the 258,000 adherents of Mr. E. R. Wood is not absolutely certain but probably the joke is on them. It is rather needless to say that the Pennsylvania delegation did not consider themselves under obligation to support the state's recorded choice.

South Dakota. Fourth Tuesday in March. General state primary. Probably the most elaborate and complex presidential primary law. A sort of state convention may by majority vote propose candidates for the presidency, national committeemen, and delegates to the national convention. Any five or more members of the convention may propose an additional set of candidates, and finally, independent proposals may be made by petition. Delegates are apparently elected at large, but not much importance is attached to their election because the endorsement of a presidential candidate and of his paramount issue at the primary has the force and effect of instruction to the delegates, who must then vote for such candidate at least three

times before supporting any compromise candidate. A primary publicity pamphlet and a joint debate between the presidential candidates or their representatives are provided for. The state seems to be the unit for the preference vote. No pledge is considered necessary for the delegates, who make no indication of their choice of candidates. At the last primary no candidates for delegate other than those of the state proposal meeting were put up. A voter requests any party ballot he wishes and if challenged on the ground of party membership must make oath that he is in good faith a member of the party.

Vermont. Third Tuesday in March. Regular state primary second Tuesday in September. State conventions, held within three weeks after the primary, select delegates to the national conventions. Delegates to the state conventions do not seem to be elected at the primary but according to the direction of the state committees. There is no provision to bind the delegates or to secure the election of delegates in sympathy with the successful primary candidate. There is no restriction on voting in the primary based on party affiliation.

West Virginia. Last Tuesday in May. At the same time the general state primary is held, which, in other years, comes the first Tuesday in August. Preference vote and direct election of delegates. There is nothing to indicate a rule of apportionment except the mention of delegates among state officers and again among district officers. A candidate for delegate files a statement as to whether or not he will support for the party nominee the popular choice of the primary either in the district or the state, according as he is a district or state delegate. This statement does not seem to be printed on the ballot. The corrupt practices act applies specifically to delegates and presidential aspirants but in fixing the maximum amounts of expenditure neither presidential candidate nor delegate is mentioned.

Wisconsin. First Tuesday in April. State primary biennially on the first Tuesday in September. Four delegates are elected at large and two from each district. Preference vote also. The alternate delegates are appointed by the state committees. In California the alternates are selected by the delegates and either of these systems has much to commend it. No consent is required from an aspirant for president to the use of his name at the primary. Any candidate for delegate may have printed after his name on the ballot a five word statement of principles or candidates favored by him. The primary is "open," as in Montana, and the voter receives the ballots of all

parties. There seems to be no special provision for holding the delegates to the support of the people's choice for president. There is really no evidence of intention that such choice should bind the delegates.

RECAPITULATION

This review of the presidential primary laws in these twenty states may be briefly recapitulated. Three states, Vermont, Michigan, North Carolina, provide for a preference vote on the presidential aspirants but make no provision whatever for the selection of delegates. Two other states, Indiana and Maryland, take a preference vote and allow the national delegates to be selected by state conventions, for which the delegates are chosen at the time of the preference vote. Three states, New York, New Hampshire, California, provide for the direct election of delegates, but not for a preference vote, although California's grouping arrangement is practically equivalent to a preference vote, and New Hampshire allows delegates to pledge themselves to support certain presidential candidates. The remaining states elect delegates directly (except delegates at large in Illinois) and permit the voters an expression of preference among the aspirants. Montana, North Dakota and probably South Dakota (with California), select their quotas on a general ticket.

16. THE PRESIDENTIAL BALLOT[1]

By Leon E. Aylesworth

The form of the presidential ballot has been undergoing a decided transformation in recent years. The goal of this development has been to bring the ballot and its demands on the voter and taxpayer into harmony with the actual political facts, as compared with the more legal formalities of the presidential election. Legally, the voters simply vote for and elect presidential electors, who later elect the president and vice-president according to their own judgment and discretion. Politically, the voters really elect the president and vice-president, for political usage has taken from the electors all exercise of independent judgment and reduced them to human push buttons who automatically register the popular will. Voters rarely or never think, or speak of themselves as voting for electors, or scarcely for

[1] Reprinted from the *American Political Science Review,* February, 1923 by permission of the editor.

vice-president, but, practically always, for this or that candidate for president.

The presidential ballot has been slow in reflecting this revolution in the nature of the presidential election. For long years its form was, and in most states still is, unduly dominated by the strictly legal theory of the election and function of the presidential electors. This is evidenced by the trouble-making requirement that electors be voted for individually, by the utterly irrational instructions to voters as to how to vote a split electoral ticket, and by the useless and expensive retention on the ballot of the names of candidates of presidential electors.

The ballot is only an instrument or agency by which the voter seeks to express his will. The cardinal test of any form of ballot is not its size or cost, important as they are, but whether it promotes or insures, rather than impedes or defeats, an independent and accurate registry of the intention of the voter. Therefore, the vital element in the form of the presidential ballot is the method prescribed for voting for electors,—whether or not it conforms as far as possible to the actual political facts and the general popular understanding of the presidential election.

Judged by this standard, five main types of presidential ballot were in use in the last election: The first type makes no provision for voting for electors as a group. Each elector must be voted for individually by a separate cross mark opposite his name.[2] Ten states used this form of ballot.[3] In all of these except Florida the candidates of each party for electors were grouped together. On the Arkansas ballot the names of the nineteen [4] electoral candidates were printed solidly in a single column with no dividing lines but with an abbreviated party name after that of each candidate. The other eight states marked off the groups by clear dividing lines and party designations. But in Florida the twenty-nine [5] electoral candidates of five different parties were printed on the ballot in a single column, alphabetically arranged regardless of party, with no dividing lines and no party designations whatever.

This looks like a deliberate scheme to confuse the voter, and make the ballot an instrument for defeating instead of registering his will. This type of ballot at its best is highly undesirable, the more

[2] In Arkansas the voter votes negatively by marking out the names of the candidates he does not favor.

[3] Arkansas, Colorado, Florida, Mississippi, Montana, Nevada, New Jersey, Oregon, Tennessee, Wyoming.

[4] Nine Democrats, nine Republicans, one Socialist.

[5] One was the candidate of two parties.

so the larger the number of electors to be chosen. It opens the door to unintentional errors in voting which are the main cause of the splitting of the electoral vote of a state contrary to the real desire of the voters.[6]

The second type permits voting for the electors as a group, but only by voting a straight party ticket, national, state, and local, except in South Carolina.[7] If the voter wishes to split his ticket he must vote for the electors individually with the attendant extra labor and risk of error. This form of ballot is in use in nineteen states.[8] It solves the problem for the straight party ticket voter but not for the independent voter. Moreover, it tends to induce straight voting by many who dislike the extra labor, or fear they lack the understanding, required to cast a split ticket that accurately expresses their will.

A third type makes provision for voting for the electors as a group by one mark without having to vote a straight ticket, but also provides for voting for electors individually. Ten states [9] now have this form of ballot. New Jersey changed to this form in 1921.[10] The Pennsylvania ballot, unlike the other nine, also provides for voting for electors by voting a straight party ticket, thus affording three ways of casting an electoral vote. Six of these states join this group by providing for separate presidential ballots.[11] This style of ballot is a decided step in advance of type two but is vitiated by the provision for voting for electors individually.[12]

The fourth type provides that electors are to be voted for as a group only, and no opportunity is offered to vote for them individually. There are two forms of this type of ballot, each in use in four states. In Arizona, New Hampshire, North Dakota and Rhode Island, which have the party column form of ballot, with party

[6] Of the last eleven elections only four have been free from divided electoral votes, of which there were eleven in all in seven different states, not counting the Michigan division of 1892 due to choosing electors by districts.

[7] South Carolina has a separate national ballot for electors, senators and congressmen.

[8] Alabama, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Missouri, New Mexico, Oklahoma, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia.

[9] California, Maine, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Vermont, Wisconsin.

[10] *Laws*, 1921, ch. 81, p. 74.

[11] Maine, New York, North Carolina, Ohio, Vermont, Wisconsin. In Maine due primarily, no doubt, to the practice of choosing all other national and state officers in September.

[12] Note the divided electoral vote in states having this type. California in 1880, 1892, 1896 and 1912; in Maryland in 1904 and 1908; in Ohio in 1892.

circle or square, the voter may vote for the electors as a group in two ways, either by a single mark in the party circle or square, if he wish to vote a straight ticket, or by a mark in the square applying to the electors only, if he prefers to vote a split ticket. In Kansas, Massachusetts, Minnesota, and Virginia, which have the office group form of ballot with no party column or party circle, the voter votes for the electoral candidates of a party, in only one way, namely, a mark in a square applying to the entire group.[13]

These four types of presidential ballot so far presented include those in use in forty-six of the states. All have printed on them the names of the electoral candidates, accompanied by the names of the corresponding party candidates for both president and vice-president in twenty-three states,[14] and for president alone in three.[15] the presidential ticket is accorded the place of honor and advantage at the head of the ballot with only two or three exceptions.[16] All the ballots but those of twelve states give the voter an opportunity to express a personal choice for electoral candidates not on the ballot.[17] Several states are guilty of the absurdity of carefully instructing the voter how to mark his ballot so as to split his presidential vote.[18]

The fourth type, particularly as found in Minnesota, represents the best presidential ballot attainable if the names of candidates for electors are to be retained. It does away with the absurd legalism of presenting an opportunity to vote for electors individually, and of instructing a voter how to split his presidential vote. This is vitally important even in states having the minimum of electors, as shown by the experience of North Dakota and Oregon in 1892.[19] Moreover this form eliminates very largely the labor, expense and liabil-

[13] In Virginia each group of electors is topped by the names of the party candidates for president and vice-president, and the voter votes negatively for a group of electors by scratching the names of the presidential and vice-presidential candidates he does not favor.

[14] Colorado, Georgia, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin.

[15] Arizona, Minnesota, North Dakota.

[16] In Alabama and Oklahoma the names of the electoral candidates come after those of congressional and state officers. There is doubt regarding Mississippi and Tennessee.

[17] Colorado, Delaware, Illinois, Indiana, Iowa, Michigan, Minnesota, Nebraska, Ohio, Virginia, Washington, West Virginia.

[18] Notably Maine, New York, Vermont, and Wisconsin despite their having separate presidential ballots. However such instructions logically accompany an opportunity to vote for individual electors.

[19] North Dakota's three electoral votes were divided among three candidates, while Oregon gave three of her four to one candidate and one to another.

ity of error involved in counting, recording, and canvassing the votes for individual electors, especially where there are many of them. Lastly, it makes possible a decided reduction in the size of the presidential ballot, while adding to the convenience of the voter, and making simpler and clearer the casting of a presidential vote that accurately registers his will.

The Minnesota form provides for printing the names of the candidates of each party for electors in small type and parallel columns, enclosed in a box or brackets, at the right and center of which is printed the name of the party, and in larger type the surname of its candidate for president. Immediately at the right of the name of the party and its candidate is a square for voting for president and, in the eye of the law, the accompanying group of electoral candidates. This ballot is superior to those of the other states having this type, mainly by reason of the smaller space on the ballot required for the presidential ticket; first, on account of the arrangement and the size of type used; second, because no space is wasted on the formality of giving the voter an opportunity to vote a personal choice for candidates not on the ballot. This practice is both politically and legally useless and unnecessary in the case of the presidential ballot. Hence, Minnesota discards it there, while retaining it for the rest of the ballot. There can be no question that the national constitution gives the states legislatures this power despite any provisions of the state constitutions.

The fifth and latest type of the presidential ballot is found only in Iowa and Nebraska, and was used for the first time in the last election. It improves upon the fourth type by entirely eliminating from the ballot the names of the candidates for electors. The names of the candidates of each party for president and vice-president are printed on the ballot enclosed in a bracket with a square or circle at the left.

In Nebraska, candidates for presidential electors are nominated by the respective party state conventions and certified to the governor by their officers. In Iowa, they are nominated by the direct primary and the result canvassed and certified to the secretary of state the same as for other offices. The electors are voted for indirectly by voting for the party candidates for president and vice-president. This may be done either by voting a straight ticket, national, state and local, by means of the party circle, or by voting a split ticket.[20]

The Nebraska law provides that "the Governor shall appoint as

[20] Iowa has the party column party circle ballot; Nebraska, the modified office group ballot, with candidates grouped under offices, but with the addition of a party circle for voting a straight ticket.

electors of President and Vice-President, those persons selected in the preceding delegate state convention by the political party whose candidates for President and Vice-President received the highest number of votes at the general election." [21] The Iowa law makes no provision for appointment by the governor or any other officer.[22] It provides as follows: "Each elector of each congressional district and each elector at large nominated by any party or group of petitioners shall receive the combined vote of the electors of the state for the candidates for president and vice-president of such party or group of petitioners, and a vote cast for the candidates for president and vice-president of the United States shall be the votes of the voter for the electors of the respective party or group of petitioners. The canvass of the votes for candidates for president and vice-president of the United States and the returns thereof shall be a canvass and return of the votes cast for the electors of the same party or group of petitioners respectively, and the certificate of such election made by the governor shall be in accord with such return." [23]

Thus, in Nebraska the vote for president and vice-president serves merely as a mandatory instruction to the governor as to whom he shall legally appoint after the canvass; while in Iowa it is made a legal vote for each of a corresponding group of electors, the result of which determines finally which candidates are elected. This difference is vital, as will be seen later, and marks the decided superiority of the Iowa over the Nebraska law.

The Nebraska and Iowa ballots excel that of Minnesota, for example, only by reason of the entire removal of candidates for elector. This step will make little difference in the expense, or the convenience of the voter, in states having but few electoral votes. But in other states having many electoral votes and huge unwieldy ballots, it will not only add to the convenience of the voter but it will save thousands of dollars now spent for paper, printing, handling, and storing, by greatly reducing the size of the ballots, and by doing away with the need for separate presidential ballots in all states except those holding a separate presidential election. Another advantage of interest to every state, regardless of the number of its electoral votes, is that the removal of the electoral candidates lessens the chance of a split in its electoral vote by reason of the resignation or death of a candidate for

[21] Laws of Nebraska 1917, ch. 33, Sec. 1.

[22] Cf. Sikes: "A step toward the Short Ballot" in *National Municipal Review*, Sept. 1922, pp. 260–262, where the writer makes the serious error of stating repeatedly that Iowa provides for the appointment of electors by the governor.

[23] Laws of Iowa General Assembly, 1919, ch. 86, Sec. 6.

elector too late to change the ballot or to inform the voters.[24] In Nebraska or Iowa such a vacancy could be filled at any time prior to the day of election.

In 1921 the legislature of Illinois passed a bill modeled after the Nebraska law but more fully elaborated.[25] An attempt was made to dispel any doubt as to the constitutionality of the choice of electors by a provision, not found in the Nebraska statute, to the effect that "placing a cross within the square before the bracket enclosing the names of President and Vice-president . . . shall only be deemed and taken to be a vote for the entire list or set of electors chosen by that political party or group (and) so certified to the Secretary of State." But like the Nebraska act the bill also provided that, "the Governor shall appoint as electors of this State, that list or set of electors, whose party or group by its voters . . . cast the highest vote for President and Vice-president," thus vesting the legal choice in the governor and reducing the presidential vote to a mandatory instruction. The governor vetoed the bill on the ground of doubtful constitutionality, and the consequent danger of the state with the third largest vote being deprived of representation in the electoral college.[26]

To some "the reasons assigned for the veto seem trivial and unsound." [27] But there is a strong probability, if not certainty, that both the bill and the Nebraska law are in conflict with the national Constitution, or, at least, a valid act of Congress. There is no doubt that the national Constitution gives each state legislature full power to determine the manner of choosing presidential electors,[28] subject only to the right of Congress to fix the time of the choice,[29] and to the limitations on the power of the states to regulate the suffrage.[30] Congress has provided that the electors "shall be appointed in each state on the Tuesday next after the first Monday in November.[31] Hence, according to the federal Constitution and statutes, the legal choice of electors must be made on that day. Under the Illinois bill and the Nebraska statute, is the legal appointment of electors made by the voters on election day, or by the governor at a later time? [32]

[24] The divided vote of West Virginia in 1916 was caused by such a resignation.

[25] House bill No. 50.

[26] Governor's veto messages, 1921, p. 6.

[27] Sikes, *op. cit.* p. 262.

[28] U. S. Constitution Art. II, sec. 1, Sub-sec. 2.

[29] *Ibid.*, Sub-sec. 4.

[30] *Ibid.*, Arts. XV and XIX.

[31] U. S. *Compiled Statutes,* Title III, sec. 199.

[32] In 1920 the presidential election fell on November 2, and the Nebraska electors were appointed by the governor on November 27.

The stronger probability is that the technical legal appointment is made by the governor on a later day, and consequently would be held unconstitutional by the courts. Therefore, in providing for the choice of electors without having the names of the candidates on the ballot, the states should study and copy, not the Nebraska, but the Iowa law, which carefully and ingeniously provides for the legal choice of the electors by the voters on the day fixed by act of Congress.

17. THE NORRIS AMENDMENT RESOLUTION[1]

A resolution for an amendment to the U. S. Constitution was adopted by the Senate, Feb. 15, by a vote of 73 to 2. It is known as the Norris Resolution because it was submitted by Senator Norris, of Nebraska. The complete provisions of the resolution are as follows:

Section 1. The terms of the President and Vice President in office at the time this amendment takes effect shall end at noon on the third Monday in January and the terms of Senators and Representatives then in office at noon on the first Monday in January of the year in which such terms would have ended if the article had not been ratified, and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in January unless they shall by law appoint a different day.

Section 3. If the House of Representatives has not chosen a President, whenever the right of choice devolves upon them, before the time fixed for the beginning of his term, then the Vice President chosen for the same term shall act as President until the House of Representatives chooses a President; and the Congress shall by law provide that in the event the Vice President has not been chosen before the time fixed for the beginning of his term, that officer shall then act as President, and such officer shall act accordingly until the House of Representatives chooses a President, or until the Senate chooses a Vice President.

Section 4. This amendment shall take effect on the fifteenth day of October after its ratification.

WHAT THE AMENDMENT MEANS

Section 1 provides that the President and Vice President (elected in the preceding November) shall take office on the third Monday

[1] Reprinted from *Current Events,* Feb. 22–26, 1926.

of the following January, instead of on the following March 4, as at present. Terms of members of Congress (both Senators and Representatives) would expire on the first Monday of January, following the November election.

Section 2 changes the date of the opening of Congress from the first Monday in December to the first Monday in January.

Section 3 gives Congress power to fill the office of President temporarily when the election of President and Vice President is thrown into Congress and there is a delay in the choice of President. At present the Constitution does not clearly state what shall be done in such a case.

Section 4 sets the date on which the proposed amendment shall become effective—on Oct. 15 following ratification.

No More Short Sessions

Under such an amendment to the Constitution there would be no more short sessions of Congress. (The short session is the second of the two regular sessions of a Congress. It opens the first Monday in December and ends on the following March 4, when the Congress comes to an end.) Instead of one regular long session and one regular short session there would be two regular long sessions of Congress. Members elected at the regular November election would take office the following January, when the new Congress would open.

Aimed at "Lame Ducks"

Now the first regular session of a new Congress does not begin until thirteen months after its members are elected. The members of the old Congress, even though defeated for re-election, do not go out of office until the following March 4. That is, they continue in office for what is now the short session of Congress. Members of Congress defeated for re-election are called "lame ducks." They have sometimes been charged with supporting measures during the short session in order to receive appointment to office after the expiration of their congressional terms. The proposed amendment would do away with "lame ducks" in Congress. It would also tend to prevent filibustering in the Senate since there would be no short session to end on a fixed date. Under the new plan the old Congress, in most cases, would adjourn before its two years had fully expired.

Times Have Changed

There seems to be no strong reason why the proposed amendment should not become a part of the Constitution. Certainly the amendment would make Congress more responsive to the vote of the people, since a new Congress would take office only two months after election. When the Constitution was adopted there were good reasons for the delays it provided. Those were "stage coach" days. Weeks or sometimes even months were required to travel to the capital. Now all that is changed and there seems to be no good reason why the President and Vice President, as well as Senators and Representatives, should not take office in January following their election.

Under the Constitution as it now stands, the old Congress elects the President and Vice President, in case the presidential election is thrown into Congress. (Twelfth Amendment.) Under the proposed amendment the new Congress would elect. Moreover, it is provided that in case of deadlock in the House over the election of President, the newly-elected Vice President, would serve until the House acted. Also, it would give Congress power to fill the office of President in case of a deadlock in the House over the choice of President and a deadlock in the Senate over the choice of Vice President.

Beard, (4th. Ed.), pp. 163–188.
Kimball, *National Government*, pp. 140–167.
Ogg and Ray, (2nd Ed.), pp. 208–232.

V

THE EXECUTIVE

The Executive branch has far outstripped the Legislative and the Judicial branches in the development of the American constitutional system, for the President has not confined himself to the position which the framers of the Constitution designed for him. The conception of the office in the twentieth century is not the result of the activities of one individual President, but an evolutionary idea which has gathered weight through the decades since the "founding fathers" met at Philadelphia. No one man has made the Presidency what it is and no one man can undo its present position of power. The growth of party organizations has been a large factor in the development of the office. The President by virtue of his place is the leader of his party, and he is forced to exercise his authority as such even though it may result in party splits. Economic and social development has created problems for the national government to solve through legislation, and more and more the Chief Executive becomes a factor in legislation through his own activities or through those of his cabinet members. This power will increase rather than decrease. The budget is one of the newer powers which has given the President authority in expenditures.

But by far the greatest power of the President is his hold upon the imagination of the people of the country. The President has acquired—or perhaps better stated, the Presidency has acquired—a high place in the mind of the average citizen. The response to a well-organized campaign backed by the President is tremendous. This may be for peace, for war, for economy, for "busting" trusts, for "normalcy," or for anything. The citizen elevates this office above party turmoils and gives the Executive his support. The President may mold public opinion and lead the country; indeed he must do this or be judged a failure. The traditional power of the President exists only as a background for his newer functions.

The duties of the office are extensive and far-reaching, from opening a World Series to calling a Conference for the Limitation of Armaments. Men break down under the strain, because party responsibility, personal responsibility, and public responsibility may cause worry, distress, and even despair. Proposals of all kinds are made for altering the type of the Executive, but day by day the power increases, the independent agencies are multiplied, the members of his official family are more involved in legislation, and the President continues as party leader, prime minister, chief executive, and leader of public opinion.

18. THE PRESIDENT'S CALENDAR[1]

FOR THE PERIOD FROM SEPTEMBER 20 TO OCTOBER 29, 1925

Executive Itinerary:

Sept. 27—The President and Mrs. Coolidge, after attending morning services at First Congregational church, boarded the Mayflower for an overnight cruise down the Potomac.

Oct. 4—Late in the afternoon the President and Mrs. Coolidge left Washington for Omaha, Nebr.

Oct. 5—The President, enroute to Omaha, delivered a brief address at Flora, a small town in Southern Illinois.

Oct. 8—The President arrived in Washington, D. C., from Omaha, Nebraska. During the 73 hours of almost continuous travel the President devoted his time to rest and relaxation and handled only such routine government affairs as were necessary. The trip covered 2,500 miles and was the longest trip President Coolidge has made since he became President.

Oct. 11—The President, at the Stadium, tossed out the first ball for the first game of the World Series in Washington, D. C.

Oct. 12—The President received Czechoslovakian debt commission.

Oct. 17—The President and Mrs. Coolidge formally opened the Art Exhibition at the Corcoran Art Gallery, signalizing the hundredth anniversary of the National Academy of Design.

Addresses:

Oct. 6—The President delivered an address at the annual convention of the American Legion at Omaha, Nebraska.

Oct. 20—The President delivered an address at the opening session of the National Council of Congregational Churches of the United States, at Washington, D. C.

Oct. 24—The President delivered an address at the international convention of the Young Men's Christian Associations at Washington, D. C.

Oct. 28—The President delivered an address at the unveiling of the monument to General José de San Martin, Argentine patriot, in Judiciary Park, Washington, D. C. The presentation was made through Ambassador Pueyrredon, of Argentina, President Coolidge making an address of acceptance.

[1] Reprinted from the *Congressional Digest*, November, 1925, by permission of the editor.

Proclamations:

Oct. 1—The President issued a Proclamation setting aside November 16–22 as American Education Week.

Oct. 4—The President issued a proclamation effecting a 50 per cent decrease in the duty on live Bob-White quail. The President rejected a recommendation by the Tariff Commission for an increase of 50 per cent in the duty on cotton warp knit fabric gloves.

Oct. 26—The President proclaimed Thursday, November 26 as Thanksgiving day in a Proclamation issued on this date.

Executive Appointments:

September 30—The President requested H. G. Dalton, Cleveland, Ohio, to inquire into the situation within the shipping board and report to him, he also requested Mr. Palmer, President of the Emergency Fleet Corporation, Chairman O'Connor and Commissioner Benson, of the Shipping Board to coöperate with Mr. Dalton.

Oct. 13—The President accepted resignation of John W. Weeks, Secretary of War.

Oct. 14—Dwight F. Davis, Mo., the Acting Secretary of War, was appointed Secretary of War, by the President, to succeed John W. Weeks, resigned. Mr. Davis took his oath of office on the day of the appointment. The oath was administered by William Howard Taft, Chief Justice of the Supreme Court.

Oct. 15—The President appointed Hanford MacNider, Iowa, assistant Secretary of War. Mr. MacNider took the oath of office October 16.

Oct. 28—The President appointed Scott Turner, of Lansing, Mich., Director of the Bureau of Mines.

Oct. 29—The President appointed Abram Garfield of Cleveland, Ohio, a member of the Fine Arts Commission.

Oct. 29—The President appointed Capt. John Halligan, Jr., chief of the Bureau of the Engineering of the Navy Department, with rank of Rear Admiral.

19. OUR EVOLVING EXECUTIVE[1]

There are wide differences of opinion on the recent exploit of the Senate in defeating the President on his first choice for Attorney-General. Are not the members of the Cabinet the President's "offi-

[1] Reprinted from the *New Republic,* April 1, 1925, by permission of the publisher.

cial family," agents through whom he exercises the powers vested in him by the Constitution? Does not the unbroken tradition of sixty years sanctify the reasonable view that the President should have a free hand in the selection of these agents? The Senate, to be sure, having the constitutional right to confirm, has the right to reject. The Constitution itself does not set bounds to this right; under its letter the Senate may reject for any reason or no reason at all. But a broad interpretation of the functions of the President establishes—so it is argued—that the Senate can properly reject only on grounds of personal unfitness. Mr. Warren, as a business man whose interests placed him on the wrong side of the anti-trust laws, might have been presumed to be biassed against those laws, but no more than Mr. Mellon as a multimillionaire might have been presumed to be biassed against the taxes on wealth. The conclusion seems clear. The Senate, running true to form, set out to give an exhibition of its power to interfere in the orderly processes of government.

There would be force in this argument if the President held in fact precisely the position the framers of the Constitution designed for him. He was expected to stand above party and faction. He was expected primarily to execute faithfully the laws enacted by Congress. It is true he could exercise an independent legislative power through the veto, but this power seems to have been bestowed on him not for personal or party uses, but for the protection of the Constitution against the invasion by the legislative branch. As the agent for the execution of the laws, the President was expected to report from time to time on their working, recommending such changes as experience dictated. There can be no question, however, that the initiative in general law making was expected to rest with Congress.

The Presidency as we know it today is a very different institution. The President is the recognized leader of his party. He exercises a degree of discretion in the execution of the laws that would have seemed shocking to the founders of the Constitution. He employs his veto power freely, to enforce his own opinion of the desirability of measures enacted by Congress. He assumes an ambitious initiative in legislation. It is taken for granted, nowadays, that the presidential election is the only great occasion for an appeal from the government to the people, and that the people's will as to the policy of the next four years is established by the outcome of the election. In his recent message President Coolidge propounds an official interpretation of the results of the last election. It is a forecast of the legislative policy he considers it his duty to enforce through his leadership of the party.

The Presidency has undergone a remarkable evolution since the

foundation of our government. It is still evolving. This process cannot go on without affecting the position of the coördinate branches of government. And when a struggle emerges between the President and Congress, as in the recent conflict over the confirmation of Mr. Warren, it is not enough to review the precedents, as if our government were actually immutable. The case must be judged after due consideration of its bearing on the evolution of the Executive in relation to the coördinate organs of government.

It will be agreed by most of the students of American government that it would be neither practicable nor desirable to thrust the Presidency back into its original position in theory of party neutrality and legislative aloofness. Government today is an immensely more complicated business than it was in 1787. Leadership and organization are essential if we are to have efficient government, and in the nature of the case the position of leader falls to the President, the single official upon whom the whole nation has a chance to vote.

But it does not follow that the President along with advisers of his own free selection is in a position to work out a scheme of policy and impose it upon Congress through an appeal to party regularity. Because of the immense variety in the conditions of American life, homogeneous nation-wide parties have represented for the most part combinations to control power and the spoils of office rather than on the basis of identity of doctrine. The Republicanism of New England and the Middle Atlantic states is not the same as the Republicanism of the Middle West or of the Pacific Coast. The Southern Democracy is not the same as that of New York and New Jersey. The President's policies will not appeal equally to all the sections and factions that elected him. The President may stand nearer to the people as a whole but the Senate and the House reflect more faithfully the actual constitution of the public opinion of the nation.

On rare occasions a strong President with a tremendous popular following may be able to ride roughshod over the discordant factions in the two Houses and put measures through by brandishing the party whip. But no method which can be worked only by a strong man will answer the requirements of efficient government. A plan of give and take between the President and the important factions of his party in Congress is the only one that will work in the long run. Appeals to party regularity may prove useful after the preliminary work of organizing party policies on a broad basis of coöperation and consent has been done. They will never signify much when they rest on nothing more substantial than vague inferences as to the popular will drawn from the results of the presidential election.

The Presidency has evolved into an organ of important functions

in the initiation of legislation and we may safely assume that this process of evolution is nowhere near its limit. The chief executive offices under the President have also undergone a process of evolution, parallel with that of the Presidency. The Secretary of State is no longer a mere adviser of the President on foreign affairs. He exercises a more or less independent influence upon all our foreign relations. The Secretary of the Treasury is the spearhead of revenue legislation. The "Mellon bill" and the place it achieved in public opinion suggest that the Secretary of the Treasury holds in fact a position analogous to that of the Minister of Finance under the parliamentary form of government. The Secretary of the Interior will have to stand sponsor for a rapidly expanding body of legislation as we come to recognize better the importance of conservation and proceed to carry forward the work of reclamation. The Secretaries of Commerce, Agriculture and Labor are obviously destined for a large rôle in industrial legislation.

In short, more and more of the time and energy of Congress will be absorbed in the consideration of measures originating in the executive departments, measures of a developmental, supplementary or corrective character. We may cling to the fiction that the executive initiative for such legislation is vested in the President, but the fact will become increasingly obvious that this initiative originates at least in part in the departments themselves. The heads of the executive departments will have to work more and more with the committees of the Houses in shaping legislation. It follows, then, that they should be men acceptable to Congress and able to work with it.

It is, to be sure, a far cry from the Warren affair to a condition in which both the Senate and the House shall have a say in determining the composition of the Cabinet. The Senate was dimly, if at all, conscious that it was moving toward a new relation with the Executive. In substance it accomplished exactly nothing, or less, in compelling the President to substitute for an acknowledged supporter of the trusts a man "who looks like a trust-buster but is not." The President is allowed still to maintain the principle that his "official family" is his private affair—within decent limits.

But as everyone knows, the steps leading to changes in the unwritten constitution are seldom clearly planned on in advance. It is in the fight over prerogative that the process of give and take, necessary to effective organization, finds its inception. When the Senate insists vigorously on its right to initiate revenue legislation, the danger of a deadlock will focus attention upon the need of a working arrangement by which the Executive, the Senate and the House each agrees to surrender some part of its traditional powers

in return for a more significant share in an organized machine of government.

Such an arrangement, some may fear, would in the end destroy the independent executive. If the heads of the executive departments must be acceptable to the legislative branch of the government, will they not have to be chosen finally from the party which dominates both Houses, or the more powerful one, whether of the President's party or not? Then will not the President become a mere figure-head? He might if historical processes worked out in the manner of pure logic.

We have a powerful tradition of the independent executive. The manner of election of the President insures him against complete subordination to Congress. The diversity of sectional and class interests is for the present too great to permit of the organization of parties sufficiently unified and persistent to wrest an excessive share of the executive power from the President's hands. But the President holds at present more power than he can wield effectively. He could afford to surrender some part of it, by giving his party in Congress a voice in the selection of the executive heads who share in legislative initiative. In the long run some such surrender will have to be made if the party is to remain an efficient agency in American government.

20. THE PRESIDENT OF THE UNITED STATES[1]

By Woodrow Wilson

The makers of the Constitution seem to have thought of the President as what the stricter Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of law and the execution of policy. His veto upon legislation was only his "check" on Congress,—was a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not to be given an opportunity to make good ones. As a matter of face he has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action. The constitutional structure of the government has hampered and limited his action in these significant rôles, but it has not prevented it. The influence of the President has varied

[1] Reprinted from *Constitutional Government in the United States,* Columbia University Press, New York, 1908, by permission of Mrs. Woodrow Wilson and the publishers.

with the men who have been Presidents and with the circumstances of their times, but the tendency has been unmistakably disclosed, and springs out of the very nature of government itself. It is merely the proof that our government is a living, organic thing, and must, like every other government, work out the close synthesis of active parts which can exist only when leadership is lodged in some one man or group of men. You cannot compound a successful government out of antagonisms. Greatly as the practice and influence of Presidents has varied, there can be no mistaking the fact that we have grown more and more inclined from generation to generation to look to the President as the unifying force in our complex system, the leader both of his party and of the nation. To do so is not inconsistent with the actual provisions of the Constitution; it is only inconsistent with a very mechanical theory of its meaning and intention. The Constitution contains no theories. It is as practical a document as Magna Carta.[2] . . . For he is also the political leader of the nation, or has it in his choice to be. The nation as a whole has chosen him, and is conscious that it has no other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and calibre. Its instinct is for unified action, and it craves a single leader. It is for this reason that it will often prefer to choose a man rather than a party. A President whom it trusts can not only lead it, but form it to his own views.

It is the extraordinary isolation imposed upon the President by our system that makes the character and opportunity of his office so extraordinary. In him are centred both opinion and party. He may stand, if he will, a little outside party and insist as if it were upon the general opinion. It is with the instinctive feeling that it is upon occasion such a man that the country wants that nominating conventions will often nominate men who are not their acknowledged leaders, but only such men as the country would like to see lead both its parties. The President may also, if he will, stand within the party counsels and use the advantage of his power and personal force to control its actual programs. He may be both the leader of his party and the leader of the nation, or he may be one or the other. If he

2 Wilson, *Constitutional Government in the United States,* pp. 68–69.

lead the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it.[3] . . . The political powers of the President are not quite so obvious in their scope and character when we consider his relations with Congress as when we consider his relations to his party and to the nation. They need, therefore, a somewhat more critical examination. Leadership in government naturally belongs to its executive officers, who are daily in contact with practical conditions and exigencies and whose reputations alike for good judgment and for fidelity are at stake much more than are those of the members of the legislative body at every turn of the law's application. The law-making part of the government ought certainly to be very hospitable to the suggestions of the planning and acting part of it. Those Presidents who have felt themselves bound to adhere to the strict literary theory of the Constitution have scrupulously refrained from attempting to determine either the subjects or the character of legislation, except so far as they were obliged to decide for themselves, after Congress had acted, whether they should acquiesce in it or not. And yet the Constitution explicitly authorizes the President to recommend to Congress "such measures as he shall deem necessary and expedient," and it is not necessary to the integrity of even the literary theory of the Constitution to insist that such recommendations should be merely perfunctory. Certainly General Washington did not so regard them, and he stood much nearer the Whig theory than we do. A President's messages to Congress have no more weight or authority than their intrinsic reasonableness and importance give them: but that is their only constitutional limitation. The Constitution certainly does not forbid the President to back them up, as General Washington did, with such personal force and influence as he may possess. Some of our Presidents have felt the need, which unquestionably exists in our system, for some spokesman of the nation as a whole, in matters of legislation no less than in other matters, and have tried to supply Congress with the leadership of suggestion, backed by argument and by iteration and by every legitimate appeal to public opinion. Cabinet officers are shut out from Congress; the President himself has, by custom, no access to its floor; many long-established barriers of precedent, though not of law, hinder him from exercising any direct influence upon its deliberations; and yet he is undoubtedly the only spokesman of the whole people. They have again and again, as often as they were afforded the opportunity, manifested their satisfaction when he has boldly accepted the role of leader, to which the peculiar origin and character of his authority entitle him. The Constitution bids him speak, and times of

[3] Wilson, *Constitutional Government in the United States,* pp. 72–75.

stress and change must more and more thrust upon him the attitude of originator of policies.

His is the vital place of action in the system, whether he accept it as such or not, and the office is the measure of the man,—of his wisdom as well as of his force. His veto abundantly equips him to stay the hand of Congress when he will. It is seldom possible to pass a measure over his veto, and no President has hesitated to use the veto when his own judgment of the public good was seriously at issue with that of the houses. The veto has never been suffered to fall into even temporary disuse with us. In England it has ceased to exist, with the change in the character of the executive. There has been no veto since Anne's day, because ever since the reign of Anne the laws of England have been originated either by ministers who spoke the king's own will or by ministers whom the king did not dare gainsay; and in our own time the ministers who formulate the laws are themselves the executive of the nation; a veto would be a negative upon their own power. If bills pass of which they disapprove, they resign and give place to the leaders of those who approve them. The framers of the Constitution made in our President a more powerful, because a more isolated, king than the one they were imitating; and because the Constitution gave them their veto in such explicit terms, our Presidents have not hesitated to use it, even when it put their mere individual judgment against that of large majorities in both houses of Congress. And yet in the exercise of the power to suggest legislation, quite as explicitly conferred upon them by the Constitution, some of our Presidents have seemed to have a timid fear that they might offend some law of taste which had become a constitutional principle.

In one sense their messages to Congress have no more authority than the letters of any other citizen would have. Congress can heed or ignore them as it pleases; and there have been periods of our history when presidential messages were utterly without practical significance, perfunctory documents which few persons except the editors of newspapers took the trouble to read. But if the President has personal force and cares to exercise it, there is this tremendous difference between his messages and the views of any other citizen, either outside Congress or in it: that the whole country reads them and feels that the writer speaks with an authority and a responsibility which the people themselves have given him.[4] . . .

Upon analysis it seems to mean this: the cabinet is an executive, not a political body. The President cannot himself be the actual executive; he must therefore find, to act in his stead, men of the best

[4] Wilson, *Constitutional Government in the United States,* pp. 76-81.

legal and business gifts, and depend upon them for the actual administration of the government in all its daily activities. If he seeks political advice of his executive colleagues, he seeks it because he relies upon their natural good sense and experienced judgment, upon their knowledge of the country and its business and social conditions, upon their sagacity as representative citizens of more than usual observation and discretion; not because they are supposed to have had any very intimate contact with politics or to have made a profession of public affairs. He has chosen, not representative politicians, but eminent representative citizens, selecting them rather for their special fitness for the great business posts to which he has assigned them than for their political experience, and looking to them for advice in the actual conduct of the government rather than in the shaping of political policy. They are, in his view, not necessarily political officers at all.

It may with a great deal of plausibility be argued that the Constitution looks upon the President himself in the same way. It does not seem to make him a prime minister or the leader of the nation's counsels. Some Presidents are, therefore, and some are not. It depends upon the man and his gifts. He may be like his cabinet, or he may be more than his cabinet. His office is a mere vantage ground from which he may be sure that effective words of advice and timely efforts at reform will gain telling momentum. He has the ear of the nation as of course, and a great person may use such an advantage greatly. If he use the opportunity, he may take his cabinet into partnership or not, as he pleases; and so its character may vary with his. Self-reliant men will regard their cabinets as executive councils; men less self-reliant or more prudent will regard them as also political councils, and will wish to call into them men who have earned the confidence of their party. The character of the cabinet may be made a nice index of the theory of the presidential office, as well as of the President's theory of party government; but the one view is, so far as I can see, as constitutional as the other.

One of the greatest of the President's powers I have not yet spoken of at all: his control, which is very absolute, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely. The President cannot conclude a treaty with a foreign power without the consent of the Senate, but he may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He need disclose no step of negotiation until it is complete, and when in any critical matter it is

completed the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also.

I have not dwelt upon this power of the President, because it has been decisively influential in determining the character and influences of the office at only two periods in our history; at the very first, when the government was young and had so to use its incipient force as to win the respect of the nations into whose family it had thrust itself, and in our own day when the results of the Spanish War, the ownership of distant possessions, and many sharp struggles for foreign trade make it necessary that we should turn our best talents to the task of dealing firmly, wisely, and justly with political and commercial rivals. The President can never again be the mere domestic figure he has been throughout so large a part of our history. The nation has risen to the first rank in power and resources. The other nations of the world look askance upon her, half in envy, half in fear, and wonder with a deep anxiety what she will do with her vast strength. They receive the frank professions of men like Mr. John Hay, whom we wholly trusted, with a grain of salt, and doubt what we were sure of, their truthfulness and sincerity, suspecting a hidden design under every utterance he makes. Our President must always, henceforth, be one of the great powers of the world, whether he act greatly and wisely or not, and the best statesmen we can produce will be needed to fill the office of Secretary of State. We have but begun to see the presidential office in this light; but it is the light which will more and more beat upon it, and more and more determine its character and its effect upon the politics of the nation. We can never hide our President again as a mere domestic officer. We can never again see him the mere executive he was in the thirties and forties. He must stand always at the front of our affairs, and the office will be as big and as influential as the man who occupies it.

How is it possible to sum up the duties and influence of such an office in such a system in comprehensive terms which will cover all its changeful aspects? In the view of the makers of the Constitution the President was to be legal executive; perhaps the leader of the nation; certainly not the leader of the party, at any rate while in office. But the operation of forces inherent in the very nature of government he has become all three, and by inevitable consequence the most heavily burdened officer in the world. No other man's day is so full as his, so full of the responsibilities which tax mind and conscience alike and demand an inexhaustible vitality. The mere task of making appointments to office, which the Constitution imposes upon the President, has come near to breaking some of our Presidents down, because it is a never-ending task in a civil service not yet put

upon a professional footing, confused with short terms of office, always forming and dissolving. And in proportion as the President ventures to use his opportunity to lead opinion and act as spokesman of the people in affairs the people stand ready to overwhelm him by running to him with every question, great and small. They are as eager to have him settle a literary question as a political; hear him as acquiescently with regard to matters of special expert knowledge as with regard to public affairs, and call upon him to quiet all troubles by his personal intervention. Men of ordinary physique and discretion cannot be Presidents and live, if the strain be not somehow relieved. We shall be obliged always to be picking our chief magistrates from among wise and prudent athletes—a small class.

The future development of the presidency, therefore, must certainly, one would confidently predict, run along such lines as the President's later relations with his cabinet suggest. General Washington, partly out of unaffected modesty, no doubt, but also out of the sure practical instinct which he possessed in so unusual a degree, set an example which few of his successors seem to have followed in any systematic manner. He made constant and intimate use of his colleagues in every matter that he handled, seeking their assistance and advice by letter when they were at a distance and he could not obtain it in person. It is well known to all close students of our history that his greater state papers, even those which seem in some peculiar and intimate sense his personal utterances, are full of the ideas and the very phrases of the men about him whom he most trusted. His rough drafts came back to him from Mr. Hamilton and Mr. Madison in great part rephrased and rewritten, in many passages reconceived and given a new color. He thought and acted always by the light of counsel, with a will and definite choice of his own, but through the instrumentality of other minds as well as his own. The duties and responsibilities laid upon the President by the Constitution can be changed only by constitutional amendment,—a thing too difficult to attempt except upon some greater necessity than the relief of an overburdened office, even though that office be the greatest in the land; and it is to be doubted whether the deliberate opinion of the country would consent to make of the President a less powerful officer than he is. He can secure his own relief without shirking any real responsibility. Appointments, for example, he can, if he will, make more and more upon the advice and choice of his executive colleagues; every matter of detail not only, but also every minor matter of counsel or of general policy, he can more and more depend upon his chosen advisers to determine; he need reserve for himself only the larger matters of counsel and that general oversight of the

business of the government and of the persons who conduct it which is not possible without intimate daily consultations, indeed, but which is possible without attempting the intolerable burden of direct control. This is, no doubt, the idea of their functions which most Presidents have entertained and which most Presidents suppose themselves to have acted on; but we have reason to believe that most of our Presidents have taken their duties too literally and have attempted the impossible. But we can safely predict that as the multitude of the President's duties increases, as it must with the growth and widening activities of the nation itself, incumbents of the great office will more and more come to feel that they are administering it in its truest purpose and with greatest effect by regarding themselves as less and less executive officers and more and more directors of affairs and leaders of the nation,—men of counsel and of the sort of action that makes for enlightenment.

21. LETTER: WARREN G. HARDING TO CHARLES R. FORBES[1]

April 7, 1921

My dear Forbes:

There is going to be difficulty in naming you to a membership on the Shipping Board. Of course, you know what this difficulty is. It is a thing that neither you or I can avoid. I do not care to write about it. I must, of course, be considerate of the Senators from any state and in case of ignoring their recommendation I cannot well choose a substitute appointment from their state.

This does not preclude a very desirable attachment of your services to the Shipping Board if that is desirable to you. It is a matter we can talk about later. Meanwhile, I have another appointment which I thought might appeal to you very strongly and I want to submit it in this confidential way.

There is a very strong contention between the conflicting elements in Alaska over the Governorship. I want to appoint a fine, outstanding man who can go there and bring about a restoration. I do not want him to represent any interests, nor go there with the thought of wrecking things. I have almost made up my mind to appoint a Governor from the States.

It has occurred to me that this might afford you a fine opportunity for constructive service and the making of a brilliant record. I do not want to go further in the consideration of your name in this con-

[1] Reprinted from the *New York Times*, Jan. 10, 1925, by permission of the publisher.

nection unless I know that it will be agreeable to you if a decision is reached to ask you to go there and serve. I do not know that I will make such a request in the final conclusion. The thing has been in my mind, however, and I wanted an expression from you before I go any further.

If you think kindly of it, I wish you would wire me in a way that I will understand without specifically mentioning the matter.

It will be perfectly easy to say that you await orders or something of that sort, so that I will understand. If you do not want me to consider it further, please say so much, but do not refer to the name of the position in the message.

I expect in some suitable way to bring you into the Government and I know you want me to work it out to the best advantage.

My very best regards.

Sincerely yours,
(Signed) WARREN G. HARDING.

Hon. Charles R. Forbes,
Care Spokane Club,
Spokane, Wash.

22. THE REMOVAL POWER OF THE PRESIDENT[1]

Executive Office,
Lynn, Mass., August 27, 1925.

Hon. B. E. Haney,
United States Shipping Board:

It having come to my attention that you are proposing to remove Admiral Palmer, contrary to the understanding I had with you when I reappointed you, your resignation from the United States Shipping Board is requested.

CALVIN COOLIDGE.

August 28, 1925.

The President,
Executive Office, Lynn, Mass.

My dear Mr. President: I am in receipt of your telegram of the 27th instant, reading as follows:

"It having come to my attention that you are proposing to remove Admiral Palmer, contrary to the understanding I had with you when I reappointed you, your resignation from the United States Shipping Board is requested."

[1] Reprinted from the *Congressional Record*, p. 1575, Jan. 13, 1926.

When you honored me last June by tendering a reappointment, I stated that I was reluctant to accept, not only for personal business reasons, but because I was not in sympathy with retaining President Palmer at the head of the Fleet Corporation.

At your request, the reasons for my opposition to President Palmer were fully and frankly stated, and were, in substance, as follows: First, without questioning his ability as a naval officer, I considered him incompetent from temperament and lack of experience to discharge the duties imposed by the merchant marine act of 1920 upon the Shipping Board, whose Agent he was; second, because he seemed determined not to confer with the board upon any of the questions which came within its peculiar province under the statute, which involved the board's discretion, and could not be delegated to the president of the Fleet Corporation; and, third, because he seemed disposed to proceed along lines independent of board action, although he was by his appointment created the board's agent. This course, in my view, was in some instances a violation of the statute, or not in accordance with the legislative intent as expressed in the statute.

Upon your invitation, I stated at length my views on these subjects without equivocation or evasion. There certainly was no express understanding concerning the continuance in office or removal of President Palmer. I regret exceedingly that you could have any misunderstanding as to my purpose and intent in the event of my reappointment, for I knew that you had been informed by Senator McNary that I would not, and in addition to that, I myself had definitely advised you that I could not accept a reappointment if any conditions whatsoever were attached to that reappointment.

I did not intend by word or act to lead you, directly or indirectly, Mr. President, to understand that if reappointed I would be a party to continuing Mr. Palmer as president of the Emergency Fleet Corporation. You knew that I had voted against his reëlection within two weeks before the time we had our conference on the subject of reappointment. You also know that I vigorously opposed the adoption of a resolution granting any powers to the president of the Fleet Corporation which the statute expressly imposed upon the board itself.

I did not intend by word or act to lead you to think my view of President Palmer and his activities, which I expressed to you, would change unless there was a change in his administrative policy. Under these circumstances, in justice to myself, I am compelled to say to you that I am not conscious of having in any way caused you to have reached the understanding referred to in your telegram.

Obviously, Mr. President, to have given you any such promise as

that implied by your telegram would have amounted to a total disregard of my oath of office and my obligation to Congress, whose sole agent I am. Such a promise and disregard of my official oath, and the consummation of such an understanding would have obligated me to support the administration of the merchant act by the president of the Fleet Corporation, however inefficient, notwithstanding the fact that the law imposed upon me, as a commissioner of the Shipping Board, the duty to support and maintain an efficient administration.

I think that I understand the purposes which Congress had in mind when the merchant marine law was enacted, and when it by law, in express terms, required the President to recognize bipartisan appointments and geographical sections in the appointment of the members of the board. The act specifically declares its purpose to be to create a merchant marine (1) for the national defense, (2) for proper growth of our foreign and domestic commerce, and (3) to serve as a naval or military auxiliary in time of war or national emergency. I respectfully direct your attention to the fact that while the merchant marine act of 1920 provides for the operation and disposition of vessels and shipping property, it also directs the board to keep clearly in mind at all times the declared purposes of the act which I have mentioned.

The board, when once appointed by the President in conformity with the statute, is an independent agency of the United States Government and is vested by the statute with large and important discretionary powers, which the members thereof are compelled to exercise independently of any other governmental agency so long as the law is in force, and, with the exception of the power of removal for causes specified in the act, the members of the board are responsible only to the legislative body.

The powers conferred upon the board are largely judicial in their nature, involving the exercise of discretion, and these powers can not be delegated by the Board to Mr. Palmer or any other agent. It may be answered that if any of these powers have been delegated to the president of the Emergency Fleet Corporation it was done by act of the board itself. But even if that be conceded, the attempted delegation of power does not deprive any individual member of the board of the right to express his opinion as to these powers and to vote, under the sanction of his oath of office, as his judgment may direct.

If, therefore, I am to be asked to resign because I have seen fit to exercise the power expressly conferred upon me by Congress in urging the removal of an inefficient agent of the board, then I submit that the control of the operation and disposition of the merchant fleet is

taken from this bipartisan and sectionally constituted body and placed in the hands of one man, for whose actions the board is responsible but whose actions it can not direct or control.

My opposition to President Palmer's administration, in addition to the reasons above stated, is based upon the following:

His policy, of necessity, fails to carry out the purposes of the merchant marine act, because such policy not only is failing to establish a merchant marine sufficient to carry a major portion of our commerce, but, on the contrary, our merchant marine is carrying less and less each year.

Again, the purpose of the act to establish a military and naval auxiliary is being disregarded in that the number of vessels in use and available for such purpose is being steadily reduced and last, but not least, under his administration we are losing American commerce to foreign shipowners, one of the very things the act in question intended should not occur.

Under these circumstances, Mr. President, for me to comply with your request that I resign would carry an implication which I can not permit.

Very respectfully,
BERT E. HANEY.

23. THE ALTGELD-CLEVELAND CONTROVERSY

Executive Office, State of Illinois
July 5, 1894.

Hon. Grover Cleveland, President of the United States,
Washington, D. C.

Sir:—I am advised that you have ordered Federal troops to go into service in the State of Illinois. Surely the facts have not been correctly presented to you in this case, or you would not have taken this step, for it is entirely unnecessary, and, as it seems to me, unjustifiable. Waiving all questions of courtesy, I will say that the State of Illinois is not only able to take care of itself, but it stands ready to furnish the Federal government any assistance it may need elsewhere. Our military force is ample, and consists of as good soldiers as can be found in the country. They have been ordered promptly whenever and wherever they were needed. We have stationed in Chicago alone three Regiments of Infantry, one Battery and one troop of Cavalry, and no better soldiers can be found. They have been ready every moment to go on duty, and have been and are now eager to go into service, but they have not been ordered out because

nobody in Cook county, whether official or private citizen, asked to have their assistance, or even intimated in any way that their assistance was desired or necessary.

So far as I have been advised, the local officials have been able to handle the situation. But if any assistance were needed, the State stood ready to furnish a hundred men for every one man required, and stood ready to do so at a moment's notice. Notwithstanding these facts the Federal Government has been applied to by men who had political and selfish motives for wanting to ignore the State Government. We have just gone through a coal strike, more extensive here than in any other State. We have now had ten days of the railroad strike, and we have promptly furnished military aid wherever the local officials needed it.

In two instances the United States marshal for the Southern District of Illinois applied for assistance to enable him to enforce the processes of the United States court, and troops were promptly furnished him, and he was assisted in every way he desired. The law has been thoroughly executed, and every man guilty of violating it during the strike has been brought to justice. If the marshal of the Northern District of Illinois or the authorities of Cook county needed military assistance they had but to ask for it in order to get it from the State.

At present some of our railroads are paralyzed, not by reason of obstruction, but because they cannot get men to operate their trains. For some reason they are anxious to keep this fact from the public, and for this purpose they are making an outcry about obstructions in order to divert attention. Now, I will cite to you two examples which illustrate the situation:

Some days ago I was advised that the business of one of our railroads was obstructed at two railroad centres, and that there was a condition bordering on anarchy there, and I was asked to furnish protection so as to enable the employees of the road to operate the trains. Troops were promptly ordered to both points. Then it transpired that the company had not sufficient men on its line to operate one train. All the old hands were orderly but refused to go to work. The company had large shops which worked a number of men who did not belong to the Railway Union and who could run an engine. They were appealed to to run the train but flatly refused. We were obliged to hunt up soldiers who could run an engine and operate a train. Again, two days ago, appeals which were almost frantic came from the officials of another road stating that at an important point on their line trains were forcibly obstructed, and that there was a reign of anarchy at that place, and they asked for

protection so that they could move their trains. Troops were put on the ground in a few hours' time, when the officer in command telegraphed me that there was no trouble, and had been none at that point, but that the road seemed to have no men to run trains, and the sheriff telegraphed that he did not need troops, but would himself move every train if the company would only furnish an engineer. The result was that the troops were there twelve hours before a single train was moved, although there was no attempt at interference by anybody.

It is true that in several instances a road made efforts to work a few green men and a crowd standing around insulted them and tried to drive them away, and in a few other cases they cut off Pullman sleepers from trains. But all these troubles were local in character and could easily be handled by the State authorities. Illinois has more railroad men than any other State in the Union, but as a rule they are orderly and well-behaved. This is shown by the fact that so very little actual violence has been committed. Only a very small percentage of these men have been guilty of infractions of the law. The newspaper accounts have in many cases been pure fabrications, and in others wild exaggerations.

I have gone thus into details to show that it is not soldiers that the railroads need so much as it is men to operate trains, and that the conditions do not exist here which bring the cause within the Federal statute, a statute that was passed in 1881 (1861) and was in reality a war measure. The statute authorized the use of Federal troops in a State whenever it shall be impracticable to enforce the laws of the United States within such States by the ordinary Judicial proceedings. Such a condition does not exist in Illinois. There have been a few local disturbances, but nothing that seriously interfered with the administration of justice, or that could not be easily controlled by the local or State authorities, for the Federal troops can do nothing that the State troops cannot do.

I repeat that you have been imposed upon in this matter; but even if by a forced construction it were held that the conditions here came within the letter of the statute, then I submit that local self-government is a fundamental principle of our Constitution. Each community shall govern itself so long as it can and is ready and able to enforce the law, and it is in harmony with this fundamental principle that the statute authorizing the President to send troops into States must be construed; especially is this so in matters relating to the exercise of the police power and the preservation of law and order.

To absolutely ignore a local government in matters of this kind, when the local government is ready to furnish assistance needed, and

is amply able to enforce the law, not only insults the people of this State by imputing to them an inability to govern themselves, or an unwillingness to enforce the law, but is in violation of a basic principle of our institutions. The question of Federal supremacy is in no way involved. No one disputes it for a moment; but, under our Constitution, Federal supremacy and local self-government must go hand in hand, and to ignore the latter is to do violence to the Constitution.

As Governor of the State of Illinois, I protest against this, and ask the immediate withdrawal of the Federal troops from active duty in this State. Should the situation at any time get so serious that we cannot control it with the State forces, we will promptly ask for Federal assistance; but until such time, I protest, with all due deference, against this uncalled for reflection upon our people, and again ask the immediate withdrawal of these troops. I have the honor to be, yours respectfully,

JOHN P. ALTGELD, Governor of Illinois

Executive Mansion, Washington, D. C.,
July 5, 1894.

Hon. John P. Altgeld, Governor of Illinois, Springfield, Ill.

Sir:—Federal troops were sent to Chicago in strict accordance with the Constitution and laws of the United States, upon the demand of the postoffice department that obstruction of the mails should be removed, and upon the representations of the judicial officers of the United States that the process of the Federal courts could not be executed through the ordinary means, and upon competent proof that conspiracies existed against commerce between the States. To meet these conditions, which are clearly within the province of Federal authority, the presence of Federal troops in the city of Chicago was deemed not only proper, but necessary, and there has been no intention of thereby interfering with the plain duty of the local authorities to preserve the peace of the city.

GROVER CLEVELAND.

Executive Office, State of Illinois,
July 6, 1894.

Hon. Grover Cleveland, President of the United States,

Sir:—Your answer to my protest involves some startling conclusions and ignores and evades the question at issue—that is, that the principle of local self-government is just as fundamental in our institutions as is that of Federal supremacy.

First—You calmly assume that the executive has the legal right to

order Federal troops into any community of the United States, in the first instance, whenever there is the slightest disturbance, and that he can do this without any regard to the question as to whether that community is able and ready to enforce the law itself. Inasmuch as the executive is the sole judge of the question as to whether any disturbance exists in any part of the country, this assumption means that the executive can send Federal troops into any community in the United States at his pleasure, and keep them there as long as he chooses. If this is the law, then the principle of self-government either never did exist in this country or else has been destroyed, for no community can be said to possess local self-government if the executive can, at his pleasure, send military forces to patrol its streets under pretense of enforcing some law. The kind of local self-government that could exist under these circumstances can be found in any of the monarchies of Europe, and it is not in harmony with the spirit of our institutions.

Second—It is also a fundamental principle in our government that except in times of war the military shall be subordinate to the civil authority. In harmony with this provision, the State troops are ordered out to act under and with the civil authorities. The troops you have ordered to Chicago are not under the civil authorities, and are in no way responsibility to them for their conduct. They are not even acting under the United States Marshal or any Federal officer of the State, but are acting directly under military orders issued from military headquarters at Washington; and in so far as these troops act at all, it is military government.

Third—The statute authorizing Federal troops to be sent into States in certain cases contemplates that the State troops shall be taken first. This provision has been ignored and it is assumed that the executive is not bound by it. Federal interference with industrial disturbances in the various States is certainly a new departure, and it opens up so large a field that it will require a very little stretch of authority to absorb to itself all the details of local government.

Fourth—You say that troops were ordered into Illinois upon the demand of the postoffice department, and upon representations of the judicial officers of the United States that process of the courts could not be served, and upon proof that conspiracies existed. We will not discuss the facts, but look for a moment at the principle involved in your statement. All of these officers are appointed by the executive. Most of them can be removed by him at will. They are not only obliged to do his bidding, but they are in fact a part of the executive. If several of them can apply for troops, one alone can; so that under the law, as you assume it to be, an executive, through any one

of his appointees, can apply to himself to have the military sent into any city or number of cities, and base his application on such representations as he sees fit to make. In fact, it will be immaterial whether he makes any showing or not, for the executive is the sole judge, and nobody else has any right to interfere or even inquire about it. Then the executive can pass on his own application, his will being the sole guide—he can hold the application to be sufficient, and order troops to as many places as he wishes and put them in command of anyone he chooses, and have them act, not under the civil officers, either Federal or State, but directly under military orders from Washington, and there is not in the Constitution or laws, whether written or unwritten, any limitation or restraint upon his power. His judgment—that is, his will—is the sole guide; and it being purely a matter of discretion, his decision can never be examined or questioned.

This assumption as to the power of the executive is certainly new, and I respectfully submit that it is not the law of the land. The jurists have told us that this is a government of law, and not a government by the caprice of an individual, and, further, instead of being autocratic, it is a government of limited power. Yet the autocrat of Russia could certainly not possess, or claim to possess, greater power than is possessed by the executive of the United States, if your assumption is correct.

Fifth—The executive has the command not only of the regular forces of all the United States, but of the military forces of all the States, and can order them to any place he sees fit; and as there are always more or less local disturbances over the country, it will be an easy matter under your construction of the law for an ambitious executive to order out the military forces of all of the States, and establish at once a military government. The only chance of failure in such a movement could come from rebellion, and with such a vast military power at command this could readily be crushed, for, as a rule, soldiers will obey orders.

As for the situation in Illinois, that is of no consequence now compared with the far-reaching principle involved. True, according to my advices, Federal troops have now been on duty for over two days, and although the men were brave and the officers valiant and able, yet their very presence proved to be an irritant because it aroused the indignation of a large class of people who, while upholding law and order, had been taught to believe in local self-government, and therefore resented what they regarded as unwarranted interference.

Inasmuch as the Federal troops can do nothing but what the State troops can do there, and believing that the State is amply able to take

care of the situation and enforce the law, and believing that the ordering out of the Federal troops was unwarranted, I again ask their withdrawal.

JOHN P. ALTGELD.

Executive Mansion, Washington, D. C.
July 6, 1894.

While I am still persuaded that I have neither transcended my authority nor duty in the emergency that confronts us, it seems to me that in this hour of danger and public distress, discussion may well give way to active efforts on the part of all in authority to restore obedience to law and to protect life and property.

GROVER CLEVELAND.

Hon. John P. Altgeld,
Governor of Illinois.

Beard, (4th Ed), pp. 163–221.
Kimball, *National Government*, pp. 168–206; 368–378.
Ogg and Ray, (2nd Ed.), pp. 234–254; 256–272.

VI

THE CABINET AND ADMINISTRATIVE ORGANIZATION

The President's cabinet in the American Government has three distinct activities. It functions as a group in advising the chief executive, but its value in this connection is determined by the attitude of the President toward advice. The story of Lincoln and his cabinet is well known, and the letters of Secretary Lane give an insight into the point of view of President Wilson. Presidents may regard the advice favorably or may use their cabinets merely as a means of confirming opinions already formed. The political effects of decisions may be discussed, and policies may be altered to correspond with the temper of the public.

The cabinet members are the heads of administrative organizations which function in varied activities. They control the appointment of many officials, determine the enforcement of laws, and provide for the execution of policies initiated by the legislative branch of the government. This work varies from the granting of steamboat licenses to the operating of the Coast Guard, the supervising of road construction, the making of educational surveys, and the collecting of the income tax. The names of the ten departments do not indicate the scope of their activities, but a perusal of the Congressional Directory gives a hint as to the breadth of their services.

The third task of the cabinet is the drafting of legislation. Cabinet members and their experts are called before congressional committees to give testimony as to the necessary provisions of legislation, and on many occasions they provide the committee with the bills carefully prepared and ready for action. One excellent illustration of this work was the Mellon Tax Bill, which was not only prepared by the Treasury Department but also carried the name of the Secretary. Cabinet officials sat on the floor of the House of Representatives and gave advice as the bill was passing through that body. This is a natural function of the cabinet, for each department through its experts is better able to prepare bills than are legislators more or less unfamiliar with the needs of the departments. It breaks down the time-honored doctrine of separation of powers and brings the executive branch in closer contact with the legislature. Proposals for official recognition of the cabinet on the floors

of both the Senate and the House of Representatives have been made many times, but the theory of separation remains in spite of the practice which has superseded the theory.

24. THE NEXT STEP IN WASHINGTON[1]

CABINET MEMBERS IN CONGRESS

By Chester H. Rowell

When President Wilson decided to deliver his message to Congress in person, he merely sent notice of his intention. No action by Congress was necessary. Strictly speaking, there is nothing but custom to prevent a Cabinet officer from doing the same thing, even without notice. The rules of both houses already give him the right to be on the floor during the sessions, and there is nothing in those rules to say he may not speak. It may be tacitly assumed, but it is nowhere expressly declared, that the right to speak is confined to members. If the Cabinet officer, therefore, were simply to rise and address the Chair, like a member, he would be violating no written law.

Of course it will never be done this way. The change is too far-reaching to be made without full agreement and an established procedure. But no new law, and especially no constitutional amendment, would be needed. A simple resolution, or, still better, a rule of each house, would suffice. The right to speak should imply ultimately, and might as well include from the beginning, the right to make motions and introduce bills, but of course it would not carry any right to vote.

It would be convenient to set aside a routine hour for each department head, perhaps once in two weeks in each house, when he would regularly attend, in order to answer questions and to make statements, but he should also have the right to speak at other times, especially when matters germane to his department were under consideration. A general field day on the budget, early in the session, with the whole Cabinet present, would also be desirable. Otherwise the rule should be as simple as possible, leaving the development of the system, whether into a minor incident or into the central feature of Congress, for practical experience to determine.

Dropping or minimizing the system would be equally easy. No

[1] Reprinted from *World's Work*, March 1925, by permission of the author and publisher.

permanent commitment is involved. If Cabinet officers did not find their attendance in Congress useful, they would avoid coming, or come only perfunctorily. Congress would make much or little use of the privilege of conferring with them, or could drop the rule entirely, according to its own experience. The plan is automatically self-expanding, self-limiting, or self-terminating. It could therefore be tried frankly as an experiment. But since no government and no private organization that has ever used it would now give it up, it is at least worth the experiment here.

Obviously, the actual conduct of the executive business in Congress should be the function of the Cabinet, and the President's personal participation need not go much farther than it does now. It is enough if by set messages and addresses he announces and takes responsibility for administration policies. He should be personally exempt from the rough-and-tumble of debate and the possible heckling of interpellation.

This follows from the very double nature of his office. The President is both prime minister and chief of state. In the one capacity he is sufficiently represented on the legislative floor by his formal appearances and by the fact that the Cabinet officers are responsible to him, and in the other capacity his place is apart from the immediate arena of conflict. Our system combines, but does not confuse, these functions. The custom of the committees of Congress already recognizes the distinction. They frequently hear Cabinet officers as witnesses and freely cross-examine them, but they receive information from the President only in official communications or by informal personal conferences at the White House. Even without this analysis, Congress would take the same distinction for granted in any system of more public contact.

IMPROVING CONGRESS WITH EASE

But, while the introduction and trial of the system would be thus simple, and might therefore be risked even by those who doubt its success, its possible advantages, to legislation and to administration, are beyond reckoning.

To the legislative process, the most immediate benefits would be to exhume leadership and to vitalize debate. It would enable Congress to become what the legislative assembly of every other free people already is—the center of gravity of government and the focus of popular attention. It would not create any new executive leadership. That exists already. It would merely remove its only menace, by making it visible and responsible. Much more important would be

the new legislative leadership which it would activate out of the ranks of Congress itself.

In the first article of this series, which appeared in Dec., 1924, was an outline of the process by which Congress, fleeing from bossism, also escaped leadership. This is not to say that Congress is merely an unorganized, unled mob. It has its officers and rules, its committees, and its influential members; otherwise it could not operate at all. But it is not too much to say that, among nations of comparable rank and advancement, there is no other national assembly in the world with so inadequate and irresponsible an organization of its leadership.

In one respect, indeed, Congress suffers rather from too much organization. It has more committees, and delegates more of its functions to them, than any other legislative body. Practically all its work, including much routine which no other legislature undertakes, is done behind their closed doors. Their chairmen constitute such official leadership as Congress has. But these chairmen have no unity or organization among themselves. Each one attained his chairmanship separately, by seniority of service on that particular committee.

A whole policy of leadership may be reversed, not by any change in the opinion of Congress, or of the nation, but by the accident of election in a single district. To take an extreme instance—suppose the Chairman of the Committee on Military Affairs to be a roaring jingo, while the member next in rank is a flat pacifist. The chairman is defeated in his district on a local quarrel over a post office appointment. So the pacifist succeeds him, and the official leadership of the military policies of the nation is reversed by the Bingville Post Office. At the same session a transformation in the opposite direction on naval affairs may be precipitated by the failure of the Mud Creek dredger appropriation. Or, changed conditions may have altered the general opinion of the majority party on a vital issue, and the newer members, as well as the President, mostly represent the revised view. All the chairmanships will nevertheless remain with the older members, who cling to the discarded policy. Nobody follows them, of course, but they are still "leaders."

This is always a possibility, and it did happen, wholesale, as to every chairman of every war committee, during the Wilson Administration, and it is happening to some extent all the time. Different leaders lead in opposite directions; they tend generally to represent the past rather than the present; their position is unaffected even when their lead is not followed; and they never meet as a body, to agree on a related Congressional or party policy. The only centralization,

now that the autocracy of the Speaker is gone, is in the weak control of a steering committee and a titular floor leader, chosen by much the same process. This is the present organization of the leadership of Congress.

As a by-product of the same process, debate has decayed, and the newspaper reporting of it grows yearly less. The debates of Parliament are the most important thing in England, and the reports of them are the most conspicuous feature of all serious British newspapers. In Congress, the real consideration and most of the major decisions take place in committee. Speeches on the floor tend to shrink to perfunctory explanations of conclusions already reached, or else to degenerate into buncombe for home consumption—and they are no longer worth much, even for that. Blasé, over-sophisticated Washington correspondents scarcely regard a speech as news unless it assaults somebody, and editors are of the opinion that the people would not read the debates, even if published.

Yet these same editors regularly print reports of speeches by the President, a Cabinet officer, or a candidate for high office, wherever delivered and regardless of quality, and their judgment is that the people do read these speeches.

Speeches are news, not because they are good or bad literature, but because they are made by somebody of significance or on a significant occasion, or because they affect somebody or something. Speeches in Parliament affect not only measures but also the defeat or victory of the party in power. There is a sporting interest in them. Every vote in Parliament is a potential national election, and every speech is a campaign document. Speeches in Congress will become news whenever they are real elements of a real transaction. And that will be whenever the real decisions of the nation are made in the open, on the floor of Congress. A people that gets excited over whether it was a left swing of a right hook that knocked out the champion can at least be interested to know whose skill or what *faux pas* discomfited the party leader.

The inevitable result of the present system is to condemn Congressmen to errand-boy localism and personal obscurity. They are denied the chief reward of public life, which is reputation and leadership. The partial survival of debate in the Senate, together with its fewer members and their longer terms, accounts for the relatively greater personal distinction of some Senators.

But no such avenue to fame is open to members of either House of Congress as stretches before the abler members of European parliaments. An important speech by Asquith, Curzon, Lloyd George, Baldwin, Macdonald, Clemenceau, Poincaré, Herriot, Marx, or

Stresemann is cabled all over the world. Their names are better known even in America than are those of any ten members of the present House of Representatives, and their retention in the public life of their countries is regarded as a national obligation. Congress offers no such career to an American.

DEVOTION TO LOCAL, NOT NATIONAL INTERESTS

This situation further exaggerates the inherent localism of our representative system. There is little chance to make a national reputation, and it would not be worth much if made. Districts are likely to resent rather than to reward their representatives for devotion to national affairs. Moreover, the attainment of high committee place, where alone such service is possible, depends little on tested national leadership, and almost wholly on long local survival in one's home district. A member might get on the Judiciary Committee, for instance, because he had been known as a lawyer or judge, and finally became chairman of it by keeping the peace of rival factions and ambitions longer than do his colleagues. And then he might in turn be ousted, as many have been, by some local booster, on the platform of running local errands and not wasting time improving the judicial system of the United States. If a disgruntled district retires a McKinley, for instance, there is no way for any other district, or for the national party organization, to do anything about it. Other nations have a remedy, and our laws theoretically provide for it, also, but our incorrigible localism has always prevented its use. This adds further to the degeneration of debate. There is little inducement, even if the rules of the House of Representatives were not made chiefly to obstruct it, to make a serious speech on a matter which is already decided and on which votes could not be changed by argument. Members will not listen, the papers will not print it, and the people would not be interested if they did. The real pressure is to get the debate out of the way, to make room for the multitude of local or special-interest private bills, in one or another of which each member's constitutents are chiefly interested. Even in the time set aside for formal debate on major measures, the pressure for "recognition" is to make (or print) speeches for distribution at home, as campaign documents.

The whole conflict of localism against nationalism, which is the bane of our legislative bodies, tends to repress debate, to decrease its quality, and to press consideration from the floor back to the committee. The very press of business makes much of this inevitable. Unless things are done in committee, most of them could not be done

at all. But not all of this press is necessary. Congress does too much. It has invaded functions which in all other governments are executive, and which could be better done by the highly staffed executive departments. Congress has not dared delegate the necessary powers to the executive department because they were irresponsible for the exercise of that power when granted.

With the heads of those departments regularly present and subject to question on the floor, there would be no reason for this hesitation. Even the committees could have a more finally delegated power, over the things on which they are in practice nearly final now. This would get the minor business done, even more efficiently than now, and would leave time for real consideration and debate of major measures on the floor. A proper organization of the now-recognized leadership would make debate physically possible, even in a numerous body like the House of Representatives. This has been accomplished in even larger chambers.

How could the mere presence and participation of Cabinet members bring all this about?

It would bring debate immediately out of secret committees into the public forum. Whatever a Cabinet officer says is heard and printed. Whatever is said in reply, in explanation, in defense, or in alternative suggestions has some of the same interest attached. The fact that the administration policy or prestige is involved adds the sporting interest. The debate will be before the national audience, and reputations made in it will be nationally worth while. It will even penetrate the home communities, and lessen the pressure to deliver mere local campaign documents. Leaders will prefer, in parceling out time, those who can contribute something to the result. This is what occurs in other countries.

This would activate leadership in Congress itself. An incompetent or dissenting committee chairman, holding by mere seniority, would spectacularly fizzle, and some one would assume his leadership by title of competency. Such a member could become as big a man at home as he had grown to be in Washington. Districts would be proud, instead of resentful, of a representative to whom other districts looked up. Or, if an individual district were in disagreement with a brilliant representative, it would not be beyond hope that some other district, in agreement on policy, would take advantage of its constitutional privilege to choose him for its representative. In this practice consists the salvation of Parliamentary leadership in Britain.

Unquestionably, the quality of legislation would be improved. The reputation of an administration would depend on the careful preparation as well as on the policy of its bills. They would represent a re-

lated plan. Not only could expert staffs draw technically better bills, but also the department head would dare introduce bills leaving administrative detail to administrative officers. If he does that now, before a committee, he is turned down. But before Congress he would have the advantages of publicity and of the argument: "You have me here now, to hold me responsible for what is done." There would not be the temptation to "ear mark" appropriations beyond the limit of efficiency.

Much futile debate, inquiry, and investigation would disappear. A vast lot of time and agitation is now wasted on things that never happened. A simple statement of fact, by the department head concerned, would often clear up the matter in two minutes.

It would be somebody's business to be responsible for the major bills and a related policy. It would be the business of the Opposition to meet the challenge of offering an alternative positive policy, for which it would be willing to be responsible. Party associates of the Administration, if they wished to cavil, to amend or improve, would have to give reasons for their changes. If it developed that an Administration measure was crude and half-considered, so much the worse for the Cabinet head concerned, and so much the better for the committee chairman or sub-chairman who remedied the defect. He would be in line for a Cabinet position himself, perhaps not much later.

The mass of private bills could be lumped for reference to administrative departments as well as to Congressional committees. With the aloofness gone, expert reports would no longer have to be regarded with suspicion and hostility. Staffs and committees, in fact, could co-operate. The Postmaster-General could ask for a public buildings bill for the buildings he really needs, without paying the pork-barrel price of distributing other buildings among enough districts to produce the necessary votes. Neither the Postmaster-General nor the committee can stand against that pressure under the present system. Very important and much needed public building plans, which would save a great deal of money, are now being held up, for this reason.

REMOVE THE STRAIT-JACKET!

In administration, the improvement would be even greater. The departments work in strait-jackets now. They are wound in red tape and held to minute statutory regulations designed to deprive them of the discretion on which efficiency depends. Often they are reduced to subterfuges to operate at all. An office full of clerks work-

ing on one job will be drawing pay for work ostensibly done on other jobs. These regulations may be legitimate, and are certainly inevitable, under the system of aloofness and mutual irresponsibility. They could not long survive a plain statement on the floor from the department head, showing the cost and undertaking to be personally responsible for the exercise of the discretion requested, and to be ready to answer questions regularly in Congress on it. The last excuse for the statutory strait-jacket would disappear.

The shocking undermanning of the expert staffs of Congress would be remedied. The abundant staffs of the departments could be used co-operatively, instead of burdensomely, as now. Requests from Congress for information now overload staffs, to the detriment of their regular work, to collate facts nine-tenths of which are commonly useless. If, instead, the Cabinet officer were asked the question personally in Congress, he could frequently answer it off-hand, or after a day's delay; or he could get the necessary investigation done efficiently and give the digested answer uncluttered with incidental lumber. This would save administrative waste and add enormously to the intelligence of Congressional legislation.

The Cabinet itself would acquire unity and a more carefully chosen personnel. As pointed out in the previous article, the Cabinet does not now have to be in agreement, and rarely is. It does not even have to consult. But if it represented the Administration on the floor, it would have to agree first. No member could be advocating something which another, or all the others and the President, opposed. Members could not lobby and intrigue against each other for extra appropriations and pet measures if they had to do it out loud and visibly. The very process of achieving unity would make the Cabinet a consultative body, a real privy council. Its members would be chosen originally for harmony, and if one of them afterward found himself in disagreement, he would yield or resign.

"A MAN IS KNOWN BY HIS FRIENDS"

It would also have a marked selective effect on the personnel of the Cabinet itself. No President would dare appoint unsuitable or uncongenial persons, to meet some obligation or placate some interest, if he had to be represented in Congress by them. What President would have put Bryan in so misfit a place as Secretary of State, or, appointing a Lansing, have failed to take him into his confidences, if the appointee were his spokesman? Or how long would a Daugherty or a Fall have survived constant Congressional and public scrutiny?

To this it has been replied that the selection would operate adversely also. A President would be deprived of the services of excellent administrators who are not well-adapted to the wrangle of Congressional debate, and reduced to men of the "talking type." The pet example is Secretary Mellon, or sometimes, Secretary Hoover, confessedly the outstanding business administrators of the present Cabinet. Hoover, though a good speaker and a ready and resourceful debater, has not a strong carrying voice, and might not be heard; while Mellon, it is said, is a business man who would be no match for Congressional demagogues and smart-Alecks at their own game.

Consider these two examples. Hoover's only disadvantage, an unresonant voice, is now removed by the invention of the microphone amplifier. With its aid, he could give a most excellent account of himself, even in the noisest debate. And the chances are that Mellon, by the quiet marshaling of facts, would soon shame the demagogue phrase-maker and the smart heckler into discomfited silence. Or, if Mellon could not, then some other great business administrator who was also a good debater would have been chosen. There are such men. At any rate, the President, not being confined to Congress for his selections nor obligated to placate its factions, would not have all the embarrassments of a British Premier, caricatured by Dickens in "Bleak House." Says Lord Boodle to Sir Leicester Dedlock:

> The limited choice of the crown, in the formation of a new Ministry, would lie between Lord Coodle and Sir Thomas Doodle—supposing it to be impossible for the Duke of Foodle to act with Goodle, which may be assumed to be the case in consequence of the breach arising out of that affair with Hoodle. Then, giving the Home Department and the leadership of the House of Commons to Joodle, the Exchequer to Koodle, the Colonies to Loodle and the Foreign Office to Moodle, what are you to do with Noodle? You can't offer him the Presidency of the Council; that is reserved for Poodle. You can't put him in the Woods and Forests; that is hardly good enough for Quoodle. What follows? That the country is shipwrecked, lost, and gone to pieces, because you can't provide for Noodle.

It is also likely that a sort of responsibilty to Congress would develop—responsibility, not of the Cabinet, but of the individual member. This does not mean that he would resign if he properly represented the President's policy and Congress disagreed. That is not our system. But if he represented it inadequately, and the defeat was obviously due to his failure of leadership, he would not find his position tenable after many such experiences.

The opportunity for Congressional leadership would open, in the prospect of Cabinet appointment, a career as a reward for Congressional success. If a President requires as Cabinet members those who can handle themselves effectively on the floor of Congress, he will be likely to make at least part of his appointments from those who have already demonstrated that capacity as members of Congress. And from these Cabinet members, occasionally a President would emerge.

This would not necessarily lead to a Congressional Cabinet, under the Parliamentary system. An editorial in this magazine last December pointed a way in which something resembling this could be done, even without a constitutional amendment, by giving the formal appointment as "Secretary" to the permanent Under-Secretary, but instructing him to take the orders of a designated Congressional leader. That, however, is a step outside the present proposal, and there is no present indication that Congress would desire it. Much more likely would be the appointment of some members of Congress who were willing to resign, and of some other persons, not in Congress.

But certainly the prospect of visible leadership and fame as a member of Congress, with the possibility of a Cabinet appointment as a sequel, would offer a career in Congress which would attract strong men to it.

To the people would come the boon of visible government—the thing we have always cried for and never got. And the Federal example would perhaps inspire a similar reform in state governments, where it is even more acutely needed.

"MR. SECRETARY, I WANT TO KNOW—"

Perhaps even more important than the right of Cabinet Ministers to speak in Congress is their duty of answering questions—or "interpellation." This is the most conspicious omission in our mechanism of government.

The importance of some form of interpellation is primarily in the control which it gives Congress over administration. But it is also the ideal short-cut method of getting information, and is a valuable safety-valve for a multitude of complaints and misunderstandings. It also gives the Cabinet officer opportunity to say things on which he must now often keep silent. Even on foreign relations, the Secretary of State could say things in the Senate, in response to a question, which it would be indiscreet for him to volunteer as a public announcement under the existing system. The fact that the Foreign Ministers of other nations are constantly required to do this in their

own parliaments would stop their mouths against complaining of it here.

Interpellation takes various forms in different countries. In England it is called the "question," and is carefully hedged about with safeguards. The Minister addressed need not reply at once. Normally he takes a day to investigate, and then, on routine matters, merely reads a formal reply prepared by some subordinate. The "question" must be really a question, and not an argument or a statement, and there is a committee to reduce it to question form before submission. There can be no heckling, general debate, or motion. The author of the question may ask another arising directly out of it, and may make one speech, but no one else may speak and no motion is in order. There is one hour each day for questions, and any not reached in that time are printed with their written answers in the proceedings. The "question," therefore, cannot be used to put the Government to a test of confidence or to risk its tenure.

The French system is the exact opposite. Any member may put whatever he regards as a question; there is full debate and often excited interchange between Ministers and Deputies; and at the close of the interpellation the routine motion to "pass to the order of the day" may be "motivated" with an expression of confidence, criticism, or condemnation of the Government. If it passes in hostile form, the Government at once resigns, and there is no appeal to the people.

Doubtless American sense of propriety would prefer something resembling the British safeguards. However, even the French system, if it should ever develop here, would be less pernicious than it is in France. Since our Cabinet officers would not have to resign, there would be no risk of anything worse than annoyance and bad taste. But let no Congressman advocate the system for America in gleeful anticipation of making a French scene with some Cabinet officer. American dignity will prevent that.

DOES CONGRESS DISAGREE?

This is no new proposal. It was, as we have seen, Washington's conception of the original intent of the framers of the Constitution themselves. It has at least twice been reported favorably by committees of the Senate and of the House of Representatives. Only three years ago it seemed almost on the point of adoption, and then, as is the way of permanent and fundamental things, it was swamped in the press of immediate tasks.

It has been favored by every President since Roosevelt. Chief Justice Taft and Secretary Hughes have constantly advocated it. It

has been moved for adoption in state constitutions by men as conservative as Elihu Root and as radical as W. S. U'Ren. It was in the Confederate Constitution. With only one exception every member of the last three Cabinets who was interviewed favored it, and several of them are among its most pronounced proponents. And it is now a definite practical emergency, on account of the budget system, which will become either undemocratic or inefficient without it.

There is nothing against it but tradition and inertia. The tradition has become meaningless and the inertia can be overcome by a popular campaign of education. It was, of course, out of the question to expect the recent "lame duck" session of Congress to do anything, and it would scarce have been worth while. But if Congressmen and their constituents, newspapers and their readers, and public-spirited and thoughtful citizens everywhere will begin to take stock of the real state of Congress, and will consider what to do about it, it is easily possible that the time may prove ripe for action at the coming session. Certainly it would be a memorable achievement for the Sixty-Ninth Congress and the Coolidge Administration.

25. THE VICE-PRESIDENT AND THE CABINET[1]

By Charles O. Paullin

During the first years of the government under the Constitution, before executive practice had become fixed, President Washington was inclined to regard Vice-President Adams as one of his official advisers, and he several times consulted him upon important public matters.[2] It was natural therefore that Washington in the spring of 1791, when planning to be absent from the seat of government for several months during a tour of the Southern states, should have named the Vice-President as an official the "Cabinet" should consult in case of an emergency. His precise words on the subject, found in a circular letter that he wrote from Mount Vernon on April 4, 1791, and sent to the Secretaries of State, Treasury, and War, are as follows: "Presuming that the Vice-President will have left the seat of government for Boston, I have not requested his opinion to be taken on the supposed emergency; should it be otherwise, I wish *him* also to be consulted."[3]

[1] Reprinted from the *American Historical Review,* April, 1924, by permission of the publisher.

[2] *Works of John Adams,* VIII. 489, 496, 515.

[3] *Writings of George Washington,* ed. W. C. Ford, XII. 35.

On April 10 Jefferson wrote to Washington that he had sent a copy of the circular letter to the Vice-President; and, "as Colo. Hamilton had asked a consultation on a letter of Mr. Short, we shall have a meeting with the Vice-President tomorrow. I will then ask their advice also on the communication to Colo. Beckwith relative to the supplies to the Indians." [4] William Short, who was the U. S. chargé d'affaires in France, wished the government's approval of the opening of a second loan at Amsterdam. Colonel George Beckwith was the confidential agent of Great Britain.

On the eleventh a "Cabinet meeting" (as it would now be called) was held, at which were present Thomas Jefferson, secretary of state, Alexander Hamilton, secretary of the treasury, Henry Knox, secretary of war, and John Adams, vice-president. The matter respecting the second loan was approved "unanimously." A mission to the Six Nations proposed by General Knox and a communication to Beckwith suggested by Jefferson were also approved.[5] Many years later, under date of February 4, 1818, Jefferson described this meeting as follows.

> Some occasion for consultation arising, I invited those gentlemen (the Secretaries of State, Treasury, and War) . . . to dine with me, in order to confer on the subject. After the cloth was removed, and our question agreed and dismissed, conversation began on other matters, and by some circumstance, was led to the British constitution, on which Mr. Adams observed, "purge that constitution of its corruption, and give to its popular branch equality of representation, and it would be the most perfect constitution ever devised by the wit of man." Hamilton paused and said, "purge it of its corruption, and give to its popular branch equality of representation, and it would become an *impracticable government:* as it stands at present, with all its supposed defects, it is the most perfect government which ever existed." [6]

It may be noted that the meeting was called by the Secretary of State, and that he took the lead in it, and not the Vice-President. As far as is known, this is the only Cabinet meeting attended by Vice-President Adams. In 1818 Jefferson remembered no other.[7]

[4] Jefferson to Washington, Apr. 10, 1791, Thomas Jefferson Papers, vol. 63, in Library of Congress.

[5] *Writings of Thomas Jefferson,* ed. P. L. Ford, V. 320–322.

[6] *Complete Annals of Thomas Jefferson* (New York, 1903), pp. 36–37. The words omitted near the beginning of the quotation are, "and the Attorney General, as well as I remember." Jefferson's contemporary account does not mention the Attorney General.

[7] Ibid., p. 36. For an account of this meeting and subsequent practice, see H. B. Learned, *The President's Cabinet,* pp. 123–125, 384–385, where will be found the essential facts, with references to sources. In writing this note

As Adams and Jefferson were of opposing politics, Adams did not during his administration invite the Vice-President to attend Cabinet meetings. He is said, however, to have spoken before his inauguration with satisfaction of the prospect of administering the government in concurrence with the Vice-President. "If by that he meant the executive cabinet," Jefferson wrote on January 22, 1797, "both duty and inclination will shut that door to me." [8] A few months later when Jefferson had become Vice-President, he again expressed himself on the same subject: "I consider my office as constitutionally confined to legislative functions, and that I could not take any part whatever in executive consultations, even were it proposed." [9] Holding so strongly to this view of the duties of a Vice-President, Jefferson, during the eight years that he was President, extended no invitations to his vice-presidents to sit in his Cabinet. By the end of his administration the practice of confining the Vice-President to his legislative duties was firmly established, and with a few exceptions has been strictly followed since that date.

All the facts of the first exception, if it is an exception, are not known. John Bigelow in his diary for September 23, 1868, gives an account of a conversation in Washington with W. H. Seward, in which Seward said: "Vice-Presidents are at first like lovers.[10] General Taylor insisted upon having Fillmore attend the Cabinet meetings, till he found out, as he did in a few months, that he was a traitor." [11] On March 10, 1849, five days after the inauguration of Taylor and Filmore, Seward wrote from Washington to Thurlow Weed: "The idea of the V(ice) P(resident) being a member of the Cabinet has expired noiselessly." [12] Weed's account, which appears in his *Autobiography,* published in 1883, is as follows:

> General Taylor after his election, conscious of his own want of experience in civil affairs, supposed, until otherwise advised by Hon. John J. Crittenden, that the Vice-President could be *ex-officio* a member of his cabinet. Expressing in a letter to Mr. Fillmore his regret that he could not have the benefit of his presence and advice in the cabinet, he added that he should rely upon his experience and ask his advice upon all important questions.[13]

I have had the benefit of suggestions made by Dr. Learned and Professor George H. Haynes.

[8] *Writings of Thomas Jefferson,* Library ed., IX. 367–368.

[9] *Writings,* ed. Ford, VII. 120.

[10] Seward's view was that a new President and Vice-President were at first very friendly, but their affection soon cooled.

[11] John Bigelow, *Retrospections of an Active Life,* IV. 214.

[12] F. W. Seward, *Seward at Washington,* II. 107.

[13] *Autobiography,* pp. 586–587. At the time of the inauguration of Taylor,

From these quotations it appears that Taylor expected Fillmore to sit in his Cabinet until informed that this could not be, that probably Fillmore never sat in it,[14] and that he advised Taylor on executive matters. It is well known that Taylor consulted Fillmore respecting several important New York appointments and followed his recommendations in preference to those of Seward.[15]

An exigency arose under President Wilson in December, 1918, when he was about to leave Washington for the peace conference at Paris, similar to that under President Washington in the spring of 1791. In each case it was caused by the contemplated absence of the President from the seat of government for a considerable time. In the case of President Wilson the Secretary of State also was to be absent. President Wilson met the exigency by inviting Vice-President Marshall to preside over the Cabinet—an invitation which was concurred in by the Cabinet. The President left Washington for Paris on December 4, and six days later, when the first Cabinet meeting after his departure was held, Vice-President Marshall attended and read the following statement:

> In assuming the Chair and presiding over what is known as a meeting of the cabinet, I deem it proper to make a brief statement so that my conduct may not be misunderstood nor misinterpreted. I am here and am acting in obedience to a request preferred by the President upon the eve of his departure and also at your request. But I am here informally and personally. I am not undertaking to exercise any official duty or function. I shall preside in an unofficial and informal way over your meetings out of deference to your desires and those of the President.[16]

Crittenden was at Frankfort, Ky. C. N. Feamster, *Calendar of the Papers of John Jordan Crittenden*, pp. 147–149.

[14] If a Cabinet meeting was held between Mar. 5 and Mar. 10, 1849, Fillmore may have attended it.

[15] F. W. Seward, *Seward at Washington, II.* 107; *Autobiography of Thurlow Weed*, p. 587; T. W. Barnes, *Memoir of Thurlow Weed*, p. 175. President Polk consulted Vice-President Dallas; and President McKinley, Vice-President Hobart. By special invitation Hobart may have attended one or more meetings of McKinley's Cabinet. In the midsummer of 1908 Mr. W. J. Bryan proposed to admit to his Cabinet Mr. John W. Kern, then a candidate for Vice-President on the Democratic ticket, if that ticket should be successful in November. There was considerable discussion of his proposal in the newspapers. H. B. Learned, *The President's Cabinet*, pp. 385–389.

[16] *New York Times*, Dec. 11, 1918, p. 14. The statement sometimes found in print that Vice-President Sherman made a practice of sitting with President Taft's Cabinet is entirely without foundation. In response to a direct inquiry on that point, letters to Professor George H. Haynes from Ex-President Taft, from a member of his Cabinet, and from a son of Mr. Sherman, all indicate that, if Mr. Sherman entered the Cabinet room during a session,

On February 25, 1919, President Wilson returned to Washington and on the same day held a Cabinet meeting, to which Vice-President Marshall was invited "as a special mark of courtesy for his presiding over the meetings during President Wilson's absence." [17] Marshall's term of service covered the period December 10, 1918–February 25, 1919.[18] He was the first Vice-President to preside at a Cabinet meeting. In response to a letter from Professor George H. Haynes asking for information respecting his service, Mr. Marshall replied under date of December 3, 1923, as follows: "At the request of President Wilson I presided over the Cabinet meetings during his first visit to Paris, and was present, at his invitation, when he returned at the close of Congress in 1919, revealing to his Cabinet his labors, and expressing his purposes, his difficulties, and his hopes." [19]

The last Vice-President to sit in the Cabinet was Vice-President Coolidge. During the presidential campaign of 1920 Senator Harding, on July 10, expressed his intentions as follows:

> The sort of government I have in mind ought to take advantage of the capacity and experience of a man like Governor Coolidge by bringing him into the councils. It would be a fine thing, and I don't see why it hasn't been done long ago. Governor Coolidge is an eminent American and has had experience as an executive and should be helpful. I think the Vice-President can be a most effective agency in keeping the executive officers in touch with the legislative branch of the Government.[20]

On December 16, President-elect Harding fulfilled his campaign pledge by asking Mr. Coolidge, who was then visiting him at Marion, to serve as an *ex-officio* member of his Cabinet, and Mr. Coolidge consented to serve. Vice-President Coolidge attended President Harding's first Cabinet meeting held on March 8, 1921, and he continued to sit in the Cabinet until June 15, 1923, when President Harding held his last Cabinet meeting.[21] He sat at the foot of the Cabinet table.[22] To what extent he participated in discussions is not

it was merely by casual invitation extended when he was calling upon the President at the White House on other business.

[17] *New York Times,* Feb. 26, 1919, pp. 1, 2.

[18] One of the meetings over which Marshall presided was held on Dec. 31, 1918, *New York Times,* Jan. 1, 1919, p. 13.

[19] Letter in the possession of George H. Hayes.

[20] *New York Times,* Dec. 17, 1920, p. 1.

[21] Vice-President Marshall is reported to have said that it was a mistake for Mr. Coolidge to sit in the Cabinet. Springfield *Daily Republican,* Mar. 10, 1921, p. 8.

[22] *Review of Reviews,* vol. LXIII. (Apr., 1921), p. 381.

known. No evidence has been found that he ever presided over a meeting. He was the first Vice-President to serve regularly as a member of the Cabinet.

26. THE EXTENT OF THE NATIONAL CIVIL SERVICE[1]

Number of Employees in Each Branch of the Federal Executive Civil Service on Dec. 31, 1923

Department or Office	*In District of Columbia*	*Outside District of Columbia*	*Total*
State	578	3,479	4,057
Treasury	17,784	35,820	53,604
War	4,204	40,638	44,842
Justice	613	2,889	3,502
Post Office	3,595	290,631	294,226
Navy	5,170	35,387	40,557
Interior	5,610	11,482	17,092
Agriculture	4,950	15,128	20,078
Commerce	2,761	8,438	11,199
Labor	1,024	2,797	3,821
Gov't. Print Office	3,989	.....	3,989
Smithsonian Inst.	494	.....	494
Interstate Com. Com.	1,394	269	1,663
Civil Service Com.	374	116	490
Bureau of Efficiency	51	.....	51
Federal Trade Com.	310	.....	310
Shipping Board	1,318	1,587	2,905
Railroad Administration	722	44	766
Alien Property Cust.	111	.....	111
Tariff Commission	211	.....	211
Empl. Compen. Com.	75	.....	75
Fed. B'd. Voca'l. Educ.	79	.....	79
Panama Canal	73	8,817	8,890
Supt. S. W. and N. Bldgs.	1,581	.....	1,581
Railroad Labor Board	.....	65	65
Gen'l Account Office	2,102	.....	2,102
Veteran's Bureau	5,152	21,809	26,961
Miscellaneous	700	250	950
TOTAL	65,025	479,646	544,671

[1] Reprinted from *Good Government*, June, 1924, by permission of the publishers.

27. PERSONNEL ADMINISTRATION IN THE FEDERAL GOVERNMENT[1]

By W. E. Mosher

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On account of the distribution of authority between Congress, on the one hand, and a shifting group of departmental heads and a comparatively permanent group of bureau heads, on the other, the federal government affords almost unlimited opportunities for the development of all possible types of administrative methods and procedure. The obsolete and the experimental are frequently found side by side whether in the field of business methods or in the handling of the personnel. A progressive administrator of the most modern type at the head of a newly created bureau may be rubbing shoulders in the same department with an old-line bureau chief who has inherited old-fashioned and time-honored methods that apparently defy all change.

From the point of view of personnel administration, it would accordingly be comparatively simple to find illustrations of the traditional type of autocratic control built upon docility and subserviency of the rank and file alongside of illustrations of modern and progressive employment practice. In fact, even when disregarding the war establishments like the Emergency Fleet Corporation and the Shipping Board, and such war-time experiments as the one in the Rock Island Arsenal, it would be easily possible to draw up a model employment policy by piecing together the up-to-date practices now in operation in various governmental establishments and along certain lines in all of them.

As the purpose of this meeting of the Academy is to consider constructive experiments in industrial coöperation between employers and employees, I shall bring together in a kind of mosaic those various features of a modern employment policy which may be discovered either in separate establishments or have been adopted for the government as a whole.

[1] Reprinted from the *Proceedings of the Academy of Political Science in the City of New York,* Volume IX, Number 4, January, 1922, by permission of the author and publisher.

I. EMPLOYMENT PRACTICES APPLICABLE TO ALL OR MOST ESTABLISHMENTS

(1) *Centralized employment administration.* The machinery for centralized control is established and operating in certain directions. Reference is made to the activities of the Civil Service Commission and the office of chief clerk of the Department and the Bureaus within the Department. In many respects these agencies may function largely as a clearing-house or recording office, but they were conceived on the basis of centralized control and, if not always, at one time or another, and in one organization or another, they successfully operate in line with this conception.

(*a*) The Civil Service Commission is the selecting agency of most Federal employees. It has an elaborate system of examinations including practically all known forms. It has experimented with psychological and trade tests and is bringing standard clerical and other tests into line with the results of war-time experience and modern psychological investigations. Within the past eighteen months, the Commission has recast the examination for second-class clerks that is given to about 100,000 candidates per year. This involves not alone nature of content and length of examination, but also method of giving the examination and marking of papers. It resulted in the saving of $11,000 during the first year.[2] The Civil Service Commission also exercises a measure of control as to probation, promotion to a higher class of work, transfer, retirement and dismissal. All changes of status are recorded in the files of the Commission. Appeals concerning certain types of dismissal may be directed to the Commission as well. Back in 1883, when the Civil Service Commission was established, the government pointed the way to the advantages of centralized employment control.

(*b*) The chief clerk as personnel officer. In practically all departments and independent establishments the chief clerk is the recognized head of personnel. He coöperates both with the Civil Service Commission and with the chief clerks who are at the head of the personnel in various bureaus and possibly minor divisions in his own department. The extent of centralized control of promotions and salary increments, transfers and the like, varies widely in the different units. In the main, however, the chief clerk of the department is likely to be responsible for original placement and for recording

[2] *Cf. Progress in Written Examinations,* Herbert A. Filer, Chief Examiner, U. S. Civil Service Commission.

changes in status and salary rate. The bureau thus becomes a fairly independent administrative unit. Its personnel problems are handled by its own chief clerk, who, in some few instances, is an alert and up-to-date personnel officer. Such a chief clerk makes himself responsible not alone for finding the right man for the right place, for controlling and standardizing efficiency ratings, and for recommending promotions and salary increments, but also for giving assistance of a personal character. The latter may involve comfort and consolation in times of distress or the lending of money when one's funds run short.

The functions of the Civil Service Commission and the chief clerk in the capacity of personnel officer just described go to show that the groundwork is laid in the existing organization of the government departments for employment administration of the most progressive sort.

(2) *Leaves.* In its provisions for annual and sick leaves with pay, the government has shown itself to be a liberal and humane employer. It recognized years ago the proverbial effect of all work and no play, and also that it was good business not to cut off a sick man's pay when he needed it the most. The standard practice for the Federal employees in Washington is thirty days' annual and thirty days' sick leave. In some bureaus, the sick leave is checked by a system of visiting nurses. I might say incidentally that this privilege is not abused as is too frequently stated. An investigation made two to three years ago goes to show that the average absence runs from five to six days per year. This is less than for industrial establishments and communities.

(3) *Compensation insurance.* The Federal Government has been operating its own compensation insurance for the past several years. The appropriation for this Commission exceeded two and one-half million dollars in the fiscal year 1921. It is handling 110 to 115 cases per day at the present time.

(4) *Retirement allowances.* Only last year a contributory system of retirement allowances for all employees was inaugurated. Although the maximum annuity does not exceed $720, and although certain features of the act should be amended, it is an important step in the right direction, inasmuch as the principle of the employer's responsibility for those who have spent their lives in his service is definitely accepted. In June, 1921, there were just 7,000 beneficiaries under the Retirement Act.

II. ILLUSTRATIONS OF PROGRESSIVE EMPLOYMENT PRACTICES FOUND IN ONE OR MORE ESTABLISHMENTS

(1) *Compensation.* The standardization of salaries as based on a classification of positions with reference to duties is found in the Post Office and Navy Departments. In the latter this applies to the Navy Yards only, but it covers mechanical, technical and clerical workers. Provisions for adjustment of wages in accordance with fluctuations in the cost of living and the wages paid for like work in the community are made for the Navy Yards. The employees have their "day in court" on this issue, since the secretary of the Metal Trades Department of the American Federation of Labor serves on the Wage Board of Review which is appointed by the Secretary of the Navy. The Government Printing Office gives extra compensation both for overtime and night work. Efficiency ratings as well as seniority are given due consideration in connection with salary increases in a number of establishments.

(2) *Efficiency ratings.* All sorts of schemes for rating efficiency are in operation. Volume of output and quality of work are naturally the most common factors. The Post Office Department has an elaborate set of well over 150 demerits for the Field Service. Attendance records are figured into the rating in several units.

The problem of standardization of rating is also receiving attention. The Bureau of Efficiency adopted the "Human Scale" in order to standardize the meanings of qualifying terms such as good, fair, excellent, etc. The Post Office Department sets up 100 per cent as the average and further requires that the average for any class of people doing the same type of work shall neither exceed nor be less than 100 per cent.

The agencies setting up and reviewing the ratings are manifold. They consist of: (1) individual administrators; (2) a conference among administrators and supervisory officials; (3) committees composed of representatives of the administrative group and the rank and file (Bureau of Chemistry). Certain bureaus are making interesting experiments with committees of review which are composed of appointed or elected representatives of the employees. The Bureau of Markets has a personnel committee consisting of five repsentatives of the rank and file appointed by the head of the Bureau. The secretary of the committee is the chief clerk of the Bureau. This committee reviews the ratings of the administrative staff; it is authorized to make up the final register on the basis of the original ratings, determining the relative order on its own authority. This

register is then submitted to the head of the Bureau. The Bureau of Mines has an elected committee for reviewing the ratings. Such a committee is to be elected in the Forest Service as well. The chairman of the latter committee is to sit with the rating board and have a vote in its deliberations. The committee may then review the ratings and refer any questions to the individual officers who originated the ratings. Publicity of ratings is required in the Navy Yards. It will be seen that the troublesome but all-important problem of working out a sound system of efficiency ratings is receiving proper attention in some quarters.

(3) *Promotion.* Efficiency ratings, training for promotion, and seniority serve as the basis for promotions in a number of bureaus.

(4) *Training.* (A) Well-organized apprenticeship training has been given in the Navy Yards. In a number of organizations systematic training of new employees is given. This is accompanied now and then by a scheme of rotation so that the newcomers may be initiated into all of the work of the section. (B) Training for promotion is offered on a large scale by the Bureau of the Internal Revenue. One thousand five hundred employees are enrolled at the present time. A definite policy of understudy training has been adopted in several organizations as well.

(5) *Probation.* All employees are subject to a six months' probationary period. In certain bureaus of Agriculture and the Treasury, in the Navy Yards and the Postal Service, this is really accepted as a part of the process of selection.

(6) *Demotion.* Regular methods of demoting employees operate in the Field Service of the Post Office Department.

(7) *Tardiness.* Tardiness is carefully checked in a number of organizations. Systematic efforts are made to reduce it by consultation with habitual late-comers and also by recognition of punctuality and by penalizing tardiness in efficiency ratings.

(8) *Working conditions.* From the point of view of working conditions, the government can point with pride to some of its office buildings and manufacturing establishments, notably the Interior Building, the Bureau of Engraving and Printing, and the Mail Equipment Shops.

Certain items are worthy of note. Modern safety and protective devices are found about the machines in the plants named. The Navy Yards have a safety engineer. The Post Office Department is having lighting conditions in the railway mail cars surveyed by specialists from the Public Health Service. The latter is also to investigate these same conditions in the post offices. A report covering working

conditions of all sorts for all buildings used by employees of the Post Office Department, both in Washington and throughout the country, is now being compiled. Four thousand replies to an elaborate questionnaire are in hand. The replies were framed after consultation with the employees in the various offices. Active measures are under way for remedying faulty conditions.

(9) *Welfare work.* The welfare work carried on by the different units, when taken as a whole, covers practically the whole range of welfare activities. One or more of the administrative units have a cafeteria, a rest room, a well-equipped hospital with regular staff of full-time physician and nurses, a visiting nurse system, and a circulating library. Information as to desirable rooms and boarding houses is supplied by the Personnel Section of the Federal Bureau and the Welfare Service of the War Department. There are a number of mutual benefit societies [3] of long standing that are usually more or less directly fostered by the administrative staffs of the respective organizations. Space has been provided in a number of the government buildings for coöperative stores, and assistance has been rendered for maintaining them. Training in first-aid work, French and Spanish, dressmaking, hat-trimming, cooking, and the like, is offered under the auspices of the personnel division in one or two units. Entertainments of all kinds, including dances and theatricals, and band concerts by their own organizations, are a part of the annual program of several organizations. Athletic teams in well-organized leagues, tennis, boating, camping and hiking expeditions go to form the out-of-door program. Athletic fields and tennis grounds are supplied and maintained at a nominal expense, or even without expense, to the participants in the sports.

(10) *Employees' organization.*

(*a*) Form. Almost any type of employees' organization may be found in the governmental establishments. The typical trade unions affiliated with the American Federation of Labor are met with among the craftsmen in the Government Printing Office, the Bureau of Engraving and Printing, the War and Navy Departments. The postal employees, including the supervisory group, are very thoroughly organized. Some of these organizatons are and some are not members of the American Federation of Labor.

There is a mixed organization of Federal employees, which includes manual, clerical, technical and professional workers. It is called

[3] *Cf. Bulletin No. 282* of the Bureau of Labor Statistics, entitled, *Mutual Relief Associations Among Government Employees in Washington, D. C.* In 1920 there were 80 such societies for sick and death benefits with a membership of 23,171.

the National Federation of Federal Employees. It has membership in the American Federation of Labor.

A unique organization just now in the process of development is that being formed in the Post Office Department under the name of Welfare Councils. Local councils are being formed in the individual post offices regardless of what might be called craft lines. These correspond to the works' council of shop union and include representatives both of workers and of the administrative staff. The national council will consist of representatives of the national unions already established. In this way a kind of national Whitley Council of postal workers will come into existence. Its chairman is the director of the Welfare Division. As he is a member of the staff of the Postmaster-General, the Welfare Council has immediate access to the policy-determining officers.[4] This is the only organization that has been directly and officially called into being by the administration of a governmental establishment.

There are of course a large number of voluntary organizations in various administrative units that are fostered in one way or another by the unit concerned. This is particularly true where much attention has been given to personnel matters, as in the Treasury and the War Departments. But the work of voluntary organizations is most commonly furthered by means of the active interest and coöperation on the part of individuals from the administrative staff who become active members of the organization and serve on its committees. The organization of the employees in the Interstate Commerce Commission is a good illustration of such semi-official coöperation.

There are then a number of organizations that are made up strictly of employees. They are considered favorably by the officers, but receive no active support at their hands.

(*b*) Functions. The functions performed are widely varied. The formal unions mentioned above stand naturally for the principle of collective bargaining and use their not inconsiderable power for the betterment of wages and working conditions. They also have their benefit associations. The postal unions and the Welfare Councils, both local and national, in the Post Office Department will doubtless work along the same lines. With the outspoken approval of these organizations expressed by the Postmaster-General, interesting developments in the direction of closer coöperation between the Department and the organized employees may be anticipated.

The inside organization, whether of a department, a bureau or

[4] For detailed discussion of the Welfare Division in the Post Office Department, *cf.* Dr. L. K. Frankel's paper appearing in this volume, p. 149. Dr. Frankel is the director of the Welfare Division.

a similar unit, may be formed for a single purpose, such as death or sickness benefits, nursing attendance, athletics, entertainment, coöperative store, and the like. On the other hand, it may combine a variety of such aims in its constitution, as does the Incomco Club of the Interstate Commerce Commission. This organization also publishes its own organ.

Mention should be made at this point of the recognition of the employees on official committees or boards. For instance, in several bureaus in the Agricultural Department an employee is appointed to serve on the efficiency rating committee. I have already referred to the Board of Wage Review in the Navy Department. This board is made up of the chief clerk of the department, a naval officer and a trade-union official appointed by the administration. The recommendations of this board as to wage changes and other phases of the employment policy were approved by the secretary of the department.

(11) *Appeals, suggestions and grievances.* Appeals are of course handled through the regular channels. It is often stated that the door of the chief administrative officer is always open. But there is probably more hesitancy to appeal over the head of the immediate superior in the government than in the typical private organization. So far as I know, there is no recognized channel of appeal except through the shop committees and officers of the well-organized unions. This holds true as well with regard to grievances.

Organized suggestion systems have not developed in the government as in many enterprising concerns. The Board of Wage Review urged in the report cited that provisions should be made for stimulating suggestions and that awards should be made for worth-while suggestions. The Post Office Department had funds for this purpose several years ago. The awards were given then, however, only for mechanical inventions and devices.

CONCLUSION

It will appear from the above analysis that the Federal Government, through one or another of its organizatons, has kept pace with modern tendencies in personnel administration. But it should be specifically emphasized that this observation does not apply to any one unit and in no way does it apply to the government as a whole. From the latter point of view, it is possible to comment only in most unfavorable terms. For the Federal Government, although the largest employer in the world, has no employment policy. No better commentary on the employment policy of the government

has been made than the characterization of the Federal employees published by ex-Secretary Lane just before his resignation. The sum and substance of it is to be found in the statement that the virtues of trust, confidence and enthusiasm are the ones most lacking among Federal employees. In his opinion the working force possessed plenty of ability but was in the state of atrophy. The creative sense and the power of initiative were crushed out, he thought, by fear and by the abnormal development of the self-protective sense. It does not need to be emphasized that the virtues which he misses are the inevitable outcome of a going personnel policy and, on the other hand, that the qualities which he finds are due to a lack of consideration of those factors with which a modern employment department is primarily engaged.

An employment policy that inspires fear and fosters subserviency, and at the same time permits a wage scale that everyone condemns from the President and the head of the Bureau of Budget down, is bound to result in the deterioration and even disintegration of the service.[5] The *Congressional Record* gives ample testimony as to the lack of respect in which governmental workers are held by those in final authority. It is small wonder that in a recent article in the *Atlantic Monthly,* a thoughtful writer could say, "with us, public servants are, as a rule, men of inferior ability and almost no imagination."

The task confronting those in charge of the administration of government is nothing more or less than the rehabilitation of the Civil Service. They may readily see at close range what success attends the introduction of an up-to-date employment policy. As has been shown, selected establishments of the government itself can demonstrate the advantages of one or another phase of such a policy. Taken altogether, these establishments will show what kind of policy is feasible under governmental conditions.

In closing, I wish to submit a practical program, both for the members of the Academy and for other friends of good government. It consists of three main features: (1) adoption of reclassification measure carrying a fair wage; (2) proper financing for the Civil Service Commission so that it may adequately perform the functions with which it is charged under the law; (3) the development in each department and independent establishment of the chief clerk's office as a central personnel department with an adequate staff and proper status to carry out a progressive employment policy.

(1) *Reclassification of Positions.* A few salient facts may be brought out to indicate the need of reclassification and salary stan-

[5] The turn-over has ranged from 50–100 per cent in some of the bureaus.

dardization. According to the report of the Reclassification Commission (1920), the government pays its senior file and record clerks under 105 different titles and at rates that range from $720 to $2,400. A thousand-dollar difference in salary for the same work is quite in the natural order of things. Furthermore, the salary scale is not in keeping with present-day prices. No changes have occurred for decades in the clerical salaries except for the addition of the bonus of $240. In the Post Office Department, for instance, the average increase since 1893 for clerks doing the same type of work is 5 per cent without the bonus and 19½ per cent with it. The index figure for foodstuffs went up in that same period 140 per cent. If it were possible to picture the sacrifices, distressing and humiliating, made by the government workers in these post-war years, it would appear that the government is profiting at the expense of the standard of living of its employees.

There are two reclassification measures before Congress. In the name of justice and efficient standards of work, they should receive the active backing of those who believe that the government should carry on its business in a businesslike way.

(2) *Larger Appropriations for the Civil Service Commission.* The Civil Service Commission is empowered to select, place and follow up employees, to classify positions, to give examinations for promotions, to consider appeals as to dismissal. It was empowered to develop standard systems of efficiency ratings and will be again if bills now fathered by the heads of the Committees on Civil Service Reform carry in the House and Senate. It is also in charge of a part of the administration of the Retirement Act. The admirable Civil Service Act of 1883 recognizes that justice and efficiency require centralization of authority with regard to the above essential factors in the employment process. The Act makes the Commission such an authority. But Congress has been consistently deaf to the pleas of one Civil Service Commission after another asking for sufficient funds to carry out the Congressional will as stated in the Act of 1883. On account of meager appropriations, the Commission has been forced to function largely as a clerical agency, it has been compelled to ignore certain of its duties and to perform the others in a routine fashion. It should have funds for developing recruits and sources of supply, for modernizing its examinations, for keeping in such close touch with the various bureaus that it can effect more satisfactory placements and arrange for transfers and promotions across departmental lines, where desirable. It should also be able to establish and assist in the proper administration of uniform efficiency ratings. Finally it should be

in a position to stimulate the personnel divisions in the different organizations and suggest to them ways and means of developing the personnel policy along modern lines.

(3) *Personnel Departments.* What the Postmaster-General has said of the projected Welfare Division in the Post Office Department should apply to the Personnel Department in general. This Division should be "just as definite in its duties and certain in its functioning as the fiscal or any other department." All of the activities discussed in the early part of this paper should be centralized under the Personnel Division. Its head should have equal prestige and authority with the heads of major divisions in the department or establishment. The staff should be large enough to keep in constant touch with the personnel of the whole organization. It must be somebody's business to see that justice, recognition of merit and a reasonable uniformity shall prevail in the administration of personnel policies, and before all else that the Federal employee may become a human being in his working life as well as elsewhere.

Finally, although speaking only of the Post Office Department, Mr. Hays might also have made the following observation with reference to the whole government service. He maintained that "the greatest progress can be made in the shortest time by improving the morale of the service, and that by merely introducing a different spirit into the relations between the department and the employees he could accomplish the equivalent of adding many thousands of employees to the department." To implant and foster this spirit of right relations is the proper task of an alert personnel division. The cost of its maintenance may be measured in thousands of dollars. If successful, its output will be measured, according to Mr. Hays, in the addition of thousands of employees.

In the thought that we are again to make of public service a satisfactory career and one attractive to promising and capable men and women, there must be some such drastic reorganization and coördination of personnel policies as is taking place along general administrative and financial lines under the leadership of General Dawes. Long-distance and intermittent personnel management by Congress, together with red-tape control by the Civil Service Commission and the individualistic tendencies of bureau heads, have brought about a state of chaos and general irresponsibility in personnel matters.

If reasonable and equitable salaries are paid, if the Civil Service Commission is equipped to do what the law empowers it to do, and if the personnel divisions of the various establishments are

staffed with men trained and experienced in the technique of employment management, we may look for the rehabilitation of the Civil Service in keeping with modern standards of efficient and effective service.

Beard, (4th Ed.), pp. 303–322.
Kimball, *National Government*, pp. 207–270.
Ogg and Ray, (2nd Ed.), pp. 274–295; 297–319; 320–335.

VII

CONGRESS—THE SENATE

James Madison once said that he could not afford to enter the Senate because it did not offer a career for a young man; so he chose the House of Representatives. The Senate was looked upon as a bulwark of conservatism, a place where the elder statesmen met for deliberation. The framers of the Constitution had in mind an advisory body for the President, but this idea was early dissipated by President Washington. At one time in our history the Senate was dubbed "a millionaires' club." What is the place of the Senate? Has the popular election of senators made the Senate a great deliberative body, or has it created merely a debating society?

The Senate dominates the House of Representatives; it is the more virile, the more outspoken, the more progressive body. It has not always caught the attention of the people favorably, but still the people believe in the Senate because traditionally they have been taught to believe in it. The sin of the Senate, that of filibustering, as outlined by Vice-President Dawes, has made little impression on the American mind. The passage of a tax bill through the House of Representatives does not thrill us; we wait until it goes to the Senate. The ideas of Borah, LaFollette, Lodge, and others have found their way into the thinking of the average man. We must add to our descriptions of the Senate for the future that it has caught the attention of the man in the street, and has become a place of more honest convictions.

28. THE SIXTY-NINTH CONGRESS[1]

Business of the Special Session—Organization of the Senate.

Duration of the 69th Congress, March 4, 1925–March 4, 1927.

The first regular session will be convened the first Monday in December, December 7, 1925, unless an extra session is called by President Coolidge.

The special session of the Senate of the Sixty-ninth Congress, called by the President for the transaction of executive business, sat from March 4 to March 18, 1925.

[1] Reprinted from the *Congressional Digest,* March, 1925, by permission of the editor.

At twelve o'clock, noon, on March 4, 1925, the 68th Congress expired, together with all pending legislation, and the new 69th Congress was ushered in. On the House side the hour arrived with comparative calm. An incident of note was the farewell tribute to the retiring Speaker of the House, Mr. Gillett, who terminated his thirty-second consecutive year of service in the House, and his sixth consecutive year as Speaker, to assume his duties in the Senate, to which he was elected last November.

On the Senate side a more dramatic scene marked the close of the 68th Congress. There the highest officials of the Government, together with distinguished foreign guests, were gathered, for the formal inauguration of the President and the Vice President of the United States.

The last act of the Senate of the 68th Congress, as required by law, was to administer the oath of office to the incoming Vice President. The gavel then fell on the 68th Congress, and immediately the new Vice President, presiding officer of the Senate, called the Senate of the 69th Congress to order. With the conclusion of the Vice President's address, the newly elected members of the Senate were sworn in.

The President-elect and his distinguished escorts, including the Supreme Court, the Cabinet, the Diplomatic Corps, Army and Navy heads, the members of the Senate and the House, and other guests, then proceeded to the east front of the Capitol, where the oath of office to the President-elect was administered by the Chief Justice of the Supreme Court, and where the President delivered his inaugural address. Immediately following the inaugural ceremonies, the Senate returned to the Senate chamber and adjourned to meet the following day.

BUSINESS OF THE SPECIAL SESSION

It is customary for a newly-elected President to call the Senate into special session to confirm the executive appointments. The purpose of the session, as stated in the formal call by the President, was "to receive such communications as may be made by the Executive." Since the 69th Congress proper will not be in session until both Houses are convened, no legislative business which requires action by both the Senate and the House could be transacted by a session of the Senate only. The work of the special session was therefore limited to executive business not requiring House action, including the ratification of treaties and the confirmation of Presidential appointments. Such business is handled by the Senate in

"Executive Sessions" which are generally secret sessions, though they may be opened to the public by a vote of the Senate.

From March 4, 1925, to March 18, 1925, the duration of the special session, the Senate ratified three treaties, as follows: On March 12, two new treaties with Canada, one the "Lake of the Woods" treaty, and the other the "Canadian Boundary Line" treaty. Both of these treaties were transmitted to the Senate by the President on February 27, were reported by the Foreign Relations Committee on March 12, and ratified by the Senate on the same day. On March 10, the Senate began consideration of the much-discussed "Isle of Pines" treaty with Cuba, which was finally ratified by a vote of 63 to 14 on March 13, 1925. For more than twenty years this treaty had hung fire in the Senate, subjected to the keenest controversy whenever brought to light. It contained the formal title to the Isle of Pines, which the United States had agreed to cede to Cuba, but which technically remained as United States territory, pending Senate ratification of the treaty.

The special session also had before it the consideration of the Lausanne treaty, and the proposal to ratify the World Court Protocol. No agreement was reached in regard to the Lausanne treaty, but on March 13 the Senate reached a unanimous-consent agreement to postpone consideration of the World Court proposal until the December session, when it will become the special order of business on December 17, 1925.

The business of confirming the President's nominations proceeded during the session as rapidly as the appointments were received from the President. Unlike treaties pending action by the Senate, which retain their *status quo* year after year, regardless of the change of Congress, Presidential appointments awaiting action do not carry over, but must be re-submitted to a new Congress. Altogether, 115 nominations, both civilian and military, were submitted by the President during the special session. Of these, 93 were confirmed, 21 not acted upon, and 1 rejected. The only major nomination not acted upon was that of Thomas F. Woodlock, of New York, to be a member of the Interstate Commerce Commission.

The storm centre of debate was the nomination of Charles B. Warren to be Attorney General. The Warren nomination was first received by the Senate on January 10, 1925, in the 68th Congress, but was not voted on during the closing days of that Congress because of threatened protest, and consequent delay to the legislative calendar. Action was therefore deferred to the special session, when the nomination was again submitted on March 5. The vote was taken on March 10 and resulted in a 40–40 tie vote. The immediate

absence of the Vice President from the chamber to break the tie prevented the confirmation. A motion to reconsider was promptly made by a proponent, by changing his vote, but a succeeding motion to table his motion was carried, and the changed vote by the proponent gave the opposition the majority. The President again submitted the nomination of Mr. Warren two days later, March 12, and after a strenuous debate not only on the nomination but also on the action of the President in re-submitting the nomination, the opposition marshalled an additional 6 votes, and the nomination was rejected again by a vote of 46 to 39.

The name of John G. Sargent of Vermont to be Attorney General was then submitted by the President, and unanimous approval was given by the Senate on March 17, 1925.

ORGANIZATION OF THE SENATE

In addition to its executive business the special session was occupied with the naming of the officers for the new Senate, the assignment of the members to the various committees of the Senate, etc. The Republican party, maintaining its majority in the new Senate, retained the privilege of naming the committee chairmen and a majority of the members of each committee. By virtue of this majority, they also name the Senate officers.

The office of President *pro tem.* of the Senate, the presiding officer when the Vice President is absent from the Chair, is also filled by the majority party, although the minority party offers a nominee for the office which is formally voted on. Senator Pittman of Nevada was nominated for the office by the Democrats, and the vote on this nomination was of interest in that it registered a straight party vote. Although ten Senators did not vote, five of the ten were Republicans, four were Democrats, and one, Farmer-Labor. The vote was thirty-six to fifty, giving the Republicans a majority of fourteen votes on a strictly Republican-Democratic line-up, counting Senators Brookhart, Frazier and Ladd who voted with the Republicans.

The Republican resolution nominating George H. Moses of New Hampshire for President *pro tempore* was then agreed to. Senator Moses succeeds Senator Cummins of Iowa as President *pro tem.* Senator Cummins, who retired voluntarily after six years' service in the chair, presided over the Senate during the entire Sixty-eighth Congress, an unusual situation due to Mr. Coolidge's elevation to the Presidency which left the Vice Presidential office vacant for more than a year and a half.

The other officers of the Senate, none of which are members of the Senate, as named by the Republicans and agreed to, were the same as those of last session, as follows: Secretary of the Senate, George A. Sanderson; Sergeant-at-Arms, David S. Barry; Assistant Door-keepers, Carl A. Loefler and Thomas W. Kelly; Chaplain, Rev. J. J. Muir, D.D.

At the meeting of the Republican Conference on March 5, the officers of the Republican party were also named, as follows: Floor Leader, Senator Curtis, Kansas (re-elected); Party Whip, Senator Jones, Wash. (appointed by the Floor Leader); Assistant Floor Leader, Senator Watson, Indiana; Secretary of the Conference, Senator Wadsworth, New York.

At the Democratic Conference of March 7, the party officers were re-elected as follows: Floor Leader, Senator Robinson, Arkansas; Vice Chairman, Senator Walsh, Montana; Party Whip, Senator Gerry, Rhode Island; Secretary of the Conference, Senator King, Utah.

In making the committee assignments this year the Republicans offered a resolution to increase by one the membership of six of the standing committees, in order to apportion the assignments evenly, giving each Senator two major committee memberships. The Democrats, who retained their present proportion of members on the committees—the increase going to the majority—agreed to the resolution. The only opposition came from Senator Norris, Nebr., R., who, together with Senator Borah, Ida., R., had opposed the action of the Republican Conference in dismissing from the Republican councils the four Senators, elected to the Senate on the Republican ticket but who had deserted the Republican ranks during the Presidential campaign—Senators LaFollette, Wisconsin; Brookhart, Iowa; Ladd, N. Dakota and Frazier, N. Dakota.

The first step toward demoting the four Senators was taken at the meeting of the Republican Committee on Committees on February 27, when the Republican committee assignments were made. Under the rule of seniority the Senators advance by point of service on the committee list until they reach the chairmanship.

The action of the Republican Committee on Committees removed the four Senators from their seniority position, on the Republican list, and placed them at the bottom of the committee ladder. This action of the Committee on Committees was subsequently approved by the Republican Conference, where further action was taken to bar the four Senators from participation in all Republican deliberations.

On March 7 the list of committee assignments as arranged by the

Republican Committee on Committees was submitted to the Senate by Senator Watson, Ind., Chairman of that committee. The Democrats did not offer to champion the insurgents, and the most active opposition came from Senators Borah and Norris, Republicans. Action by the Senate confirming both the Republican and Democratic committee slates was taken on March 9, after five hours debate. The vote was 64 to 11.

29. IN DEFENSE OF THE SENATE[1]

By Oswald G. Villard

There is no close-season for Congress—there never has been. It would be easy to print citations from the press in every decade of our history bewailing the decay of the legislative branch of the government. But of late years, consonant with the growth of the anti-democratic despotisms in Europe which have followed our war to make the world safe for democracy, and the universal dissatisfaction with parliamentary bodies, the attacks upon Congress have been more than usually virulent and more than usually successful. A year ago powerful newspapers of the country were able, by deliberate disregard of the facts, to discredit the Senate's inquiries into the oil scandals and the maladministration of the Department of Justice. When on top of all this we have Mr. Dawes's shrill abuse of the body he has been chosen to preside over, and the latest conflict between President and Senate, it is surely time to review the situation at Washington.

When, however, we regard Congress as it is today, the first fact that stands out is that, in considerable measure because of its rules limiting debate, the House of Representatives has sunk almost into obscurity. No Washington correspondent goes to its press gallery save on rare occasions; the representatives of the press associations alone attend regularly; its proceedings figure little in the press; it contains only a few men with national reputations. Yet there you have functioning precisely the kind of rules with which it is intended to muzzle the Senate. Debate can be and is limited; a steering committee of the majority outlines the parliamentary procedure, special rules for expediting legislation are easily passed—and, as a result, little important legislation originates in the House and what does is likely to be rewritten in the Senate. Undoubtedly there are still able and honest men in the House, but it is now so organized

[1] Reprinted from *The Nation,* March 25, 1925, by permission of the publisher.

that it offers few if any inducements for a political career. Whereas a young Englishman may enter Parliament at twenty-one and focus upon himself, if he has the necessary talent and ability, the attention of the entire country, there is no such avenue to distinction through our House. Charles James Fox entered Parliament when not yet twenty years of age; when only twenty-one he was appointed a member of Lord North's Government. When thirty-one years old he was the recognized leader of the Commons, "consummate master of the art of debate." Gladstone was in Parliament before he was twenty-three and he was a lord of the Treasury before he was twenty-five. The meteoric career of Winston Churchill proves that it is still the case today that a member of Parliament may instantly impress his personality upon his country if he is equipped to do so.

In our House no man today can rise to distinction save by long service, which presupposes a safe constituency and usually blind subservience to the party machine. If defeated in his district he is not permitted to seek election in another; his career is terminated. As for the House affording an opportunity to enter a government, one need only to recall how few of its members have been called into the Cabinet in the last twenty-five years; a President usually chooses his official family from private life. The House's limitation on debate, its system of promotion within committees by seniority, the complete control of its machinery by party engineers have all conspired to check any political insurgency and to produce precisely that party discipline and loyalty without which, so the President and many of the critics of Congress aver, responsible government is impossible. To judge by the plight of the House it would seem as if the choice were between party regularity and legislative inefficiency and mediocrity.

What a change if we cross the Capitol to the Senate! Here we find a press gallery teeming with correspondents, because, as one put it, "you never can tell when something interesting is going to happen." Here you have ninety-six men who really debate; the names of many of them are known where perhaps only one Congressman is remembered. Borah, Reed of Missouri, Smoot, Walsh, Johnson, Wheeler, La Follette, Watson, Shipstead, Pepper, Norris, Wadsworth, Robinson—around these and others centers the attention of the political world—frequently in direct proportion to their independence of party thralls. Here is genuine debating, often too long, it is true; sometimes actuated more by a desire to go on record for home consumption than to make a genuine contribution to the subject under discussion, yet free and genuine debating, more nearly approaching the give-and-take of European parliaments than

is to be found in any other American legislative body. If it suffers some in comparison with others, it is at least the best we have. Within the walls of this chamber men do grow in power, influence, and prestige. Here men are actually converted by the arguments of their associates, as happened the other day when the speeches of Senator T. J. Walsh and of Senator Reed of Missouri convinced some of their listeners of the strength of the case against Charles B. Warren. Here are formulated more new policies than anywhere else; here there are some men who are earnestly seeking to serve their country and the truth.

In the Senate are always men of genuine force and ability. How the present membership contrasts with earlier days people must judge for themselves, and the several verdicts will depend a good deal upon what the judges value most. If they stress breeding and courtliness and wealth most they may make out a strong case for the Senate of elder generations. If they speak only of intellectual power they may dwell preferably upon the days of Evarts, of Conkling, of Hoar, of Edmunds, of Allison, of Chandler, of Bayard, of Cullom, of Spooner, of Bacon—to go back no further—but let them beware of the luster which departing years shed upon the alleged giants of other days, and let them not turn to contemporary letters like that of John Hay to Joseph H. Choate in which, after denouncing the "howling lunatics" of the Senate, he bemoaned the fact that Senator "'W' has been divorcing his wife . . . last week, 'X' had delirium tremens, Bacon broke his ribs, Pettigrew had the grippe, and Hale ran off to New York on 'private business,' and the whole Senate stopped work until they got around again. I have never struck a subject so full of psychological interest as the official mind of a Senator." Six days later Mr. Hay resigned as Secretary of State because the views of the Senate were "so widely divergent from mine in matters affecting, as I think, the national welfare and honor. . . ."

Every generation seems to belittle or abhor its own Senators. It may well be, however, that the Senate of today has fewer minds of the extraordinary legal ability of Edmunds, Spooner, or Root. The Senate is weak today in men who can take a broad and comprehensive view of foreign affairs—Borah stands out almost by himself, and even he has periods of weakening. Whether these facts altogether constitute a loss and a serious retrogression is another matter. I can conceive of a Senate manned exclusively by blue bloods of the type of the personally pleasant Wadsworth and by brilliant lawyers of the Root type, which would stand apart from the American democracy, and be entirely subservient to our great business interests and

faithless to fundamental principles and traditions. Indeed, during the nineties the chief attack upon the Senate was that it was a "rich man's club," that its members were nearly all multimillionaires, or wealthy appointees of State bosses for favors received. Surely many people must recall the outbursts of anger when Mr. Hanna entered the Senate because he was both a boss and a very rich man. The ease with which the wealthy got into the Senate was one of the potent arguments which led to the election of Senators by popular vote. Today we no longer hear this criticism of the Senate, that it harbors only men of wealth; the prevailing indictments read differently.

Personally it seems to me that there is much to be said for the Senate of today. The uncouthness of a man like Senator Magnus Johnson is offset by the fact that he comes from the soil, that he speaks as best he can the sentiments of a very large body of American citizens who ought to have a voice in the Senate. It is a step toward democracy when a man like Henrik Shipsted comes to the Senate. Only snobs hold it against him that he was a dentist, not a lawyer or politician. That he has had much to learn, especially about foreign affairs, is true, but the most brilliant of our Eastern lawyer-Senators have usually been totally ignorant of conditions in West, South, or Southwest, and also usually in need of fundamental teachings in finance and economics. The important thing is that Senator Shipsted is working hard and growing in power; that he speaks for dissenting masses who have every right to be heard in the Senate through their own spokesmen. When it comes to men like Reed of Missouri, Norris, Borah, and Walsh, one wishes that they might be measured in a genuine debating contest with some of the giants of the past. I believe that they would acquit themselves well, with the weight of sincerity and devotion to the public weal clearly on their side.

In justice to the Senate of today it must be pointed out that in the days of Presidents Cleveland, Harrison, and McKinley the task of being a Senator was infinitely lighter than it is today. It was an unusual winter if more than one serious issue requiring deep study came before the Senate. Today there may be twenty or thirty such issues. Senator Norris has devoted two years, to the exclusion of almost everything else, to Muscle Shoals; he has found this necessary to become master of his subject. It is in large part the tireless industry of Senator Borah which has made him the force that he is; he never speaks until he is thoroughly informed. Never before did Senators accomplish so much work. One of the most important recent political developments, one of the few successful methods of

coping with the demoralizing possibilities of the growing bureaucracy, is the institution of the Senate investigating committees. It takes able men to root out corruption as the two Montana Senators did last spring. The Republicans who said in the Senate "You accepted Daugherty; why stick at Warren?" paid an unconscious tribute to the work of Senator Wheeler, who exposed the Ohio gang.

There are, of course, loafers and shirks in the Senate as everywhere else, but there is also hard work done, even though the routine demands of the Senatorial office require endless hours. One Senator asserted the other day that he needed six secretaries to keep up with his mail and to have the research work done he needs for his speeches. One secretary alone, he declared, could keep busy answering the requests and the letters received from ex-service men. One of the Pennsylvania Senators is reported to spend his entire salary upon secretarial help in addition to the secretary and clerk supplied by Congress.

It must not be forgotten, too, that many of these Senators could resign and earn large sums of money by returning to the practise of the law. This is particularly true of some of the Southerners like Heflin, Caraway, and Robinson. For those who have families and no private means it has been a struggle to live in official Washington on the salary of $7,500, which has just been raised to $10,000. True, the prestige of the office is great; the power exhilarating; the fascination of the "game" tremendous. But with all due allowance for the weak and ineffective Senators and for those obedient party tools who always vote precisely as they are told by their machine leaders, the average of the Senate is high in comparison to the House, or to the Legislature of the State of New York and of most other States.

No, the more I see of the Senate the more I respect it—even those whose political views I wholly abhor—and my feeling is shared by many of the journalists in Washington. The Senate is the one place where they get hope and encouragement, where they can learn, where there is some color, some life, some vigor, some truth-telling, some hope of substantial achievement and much independence. They say frankly that if the Senate is reduced to the rank of the House they would wish to quit their jobs. They know, if "Charley" Dawes in his pitiful ineffectiveness does not, that under Rule 22 of the Senate, on motion of sixteen Senators and by two-thirds vote, debate can be shut off. They so value the open debate of the Senate that they would unanimously vote against Dawes if the alternative were restricted talking and control by a little group of insiders—

as used to be the case in the days of the "giants," before the rise of insurgency. They believed that if the House rules were to be clamped on the Senate it, too, would sink to the zero point.

In its attitude in the Warren case the Senate stands squarely on its constitutional rights. Nothing, in my judgment, has honored the Senate more than its display of independence in this matter. To see Borah, Johnson, Norris, MacMaster (just elected as a Republican), and Norbeck refusing to obey the crack of the President's whip is to make one wish to throw up one's hat and give three hearty cheers. No matter if the main line-up in the Warren case is political, the refusal of even a few to bow down to the power of party and Presidential patronage is something to thank one's stars for.

30. CONFERENCE COMMITTEE LEGISLATION[1]

By Lindsay Rogers

It is axiomatic that constitutional forms are less important than the forces behind them and that, in actual practice, the forms are profoundly modified by conventions and extra-constitutional arrangements. Burke was right in more ways than one when he said that the laws reach but a very little way. England is, of course, the classic example of the truth of this statement, for her Parliamentary Government is controlled very largely by unwritten conventions, and its success has depended on a high degree of political morality. For, as Mr. Strachey has felicitously said, the English Constitution is "a living thing, growing with the growth of men and assuming ever varying forms in accordance with the subtle and complex laws of human character. It is the child of wisdom and chance"; and, he might have added, of thoughtlessness and selfishness as well.

But even in the United States, with a written Constitution, conventions have been developed which have an importance in some respects equal to that of the provisions of the instrument itself.

Political parties (which the "founding fathers" sought to prevent); the perfunctory task of the Electoral College; the Cabinet; the attitude of the Executive toward the Legislature; senatorial courtesy; congressional procedure, and the relations between the two branches of Congress (hegemony in practice rather than in legal theory), are all matters determined by custom and the "complex laws of human

[1] Reprinted from the *North American Review*, March 1922, by permission of the author and publisher.

character," and they have a profound influence on the Government. The exact nature of this influence cannot be determined from formal rules, but only from what is the actual practice. Government in action is more important than government in books, and it may, therefore, be worth while to direct attention to one development of congressional procedure which is not the least important of these extra-constitutional minutiæ, and which has recently been used in such a way as to challenge its propriety.

I refer to the fact that many important laws passed by Congress are really written in secret by a small group of conferees whose decision is final on what should go into the bills. The Tax Revision law is a case in point. If the debates and record votes had any value, it was simply to admonish the conferees not to be too high handed, not to flaunt too much the opinion of the House they represented. Even this restraining influence was doubtful, for the conference report was denounced by both Senators and Representatives as being contrary to the dominant opinions in each branch of Congress. At best the institution of the conference committee, necessary though it may be, has not much to commend it; regret that some better machinery of adjusting disputes did not seem possible has frequently been voiced by the most conservative as well as by more radical members of Congress. But when, as sometimes has happened, the conferees use their powers to thwart the will of Congress, to put into effect their own views which have been defeated by the opposition, and to force through in the closing days of a Congress measures which need not be printed, and which, if fully understood and discussed, would be objected to, legislation by conference committees is the negation of popular government.

With the possible exception of Australia, only in the United States does the upper chamber possess powers equal to, or even greater than, those of the more popular body. From this extreme bicameral theory arises the necessity for some machinery that will adjust differences between the two Houses and prepare a measure to be passed in identical form. The institution of a conference committee comes into American parliamentary practice from England, but there it had fallen into desuetude even before the Parliament Act of 1911 so attenuated the powers of the House of Lords. Controversies between the two chambers are not serious, or, except in rare instances, prolonged. If public opinion or technical perfection seems to support amendments made by the Lords, the Commons acquiesce. This was the case, for example, with the modifications of the Defence of the Realm Act, and, more recently, the Emergency Powers Act. Since the Government stands sponsor for practically all legislation, a con-

ference between the Ministers and leading Peers in Opposition is able to compose the differences, and, indeed, ministerial responsibility is ordinarily sufficient to prevent conflicts between the chambers or the necessity for a conference. In the United States, however, legislative leadership is vested in the elder members of Congress (the seniority rule prevailing for the chairmanships of the committees that frame legislation); both branches of Congress have opinions that they insist upon, and even when there is agreement, the legislative product of one chamber is usually so imperfect that it must be improved by the other. Hence differences are reconciled and compromises are effected by a conference committee.

The former practice, in the appointment of conferees, was for the Speaker to ignore party lines and to select managers who would be specially fitted to uphold the position of the House. It was the practice also, in the event of failure, to agree to name a new set of conferring attorneys. But the present system is automatic. The chairman, next ranking majority member, and ranking minority member of the committee having the bill in charge, are invariably selected in each branch, although, in the case of important bills, the number of conferees may be increased to ten, or even more. This practice is so uniform that there was much comment when Speaker Cannon, in appointing the conferees for the Tariff bill of 1909, selected a member of the Ways and Means Committee in preference to one of his colleagues who was his senior.

In the appointments to legislative committees, the rule of seniority is rarely departed from, and this results—particularly in the Senate—in a disproportionate number of choice committee assignments for members with long congressional service. It follows, therefore, that legislation is framed by a comparatively small number of Representatives and Senators, and when this legislation goes to conference, these senior committeemen have the final authority. The situation is more extreme in the Senate than in the House, and the figures for the Sixty-fifth Congress were very striking. One hundred and five conference committees were appointed, but five Senators served on 82 of them: Smoot, 33; Warren, 23; Nelson, 11; Lodge, 9; and Penrose, 6. To prevent this concentration of power in the Senate, it was proposed several years ago that no Senator who was chairman of one of the ten most important committees of the Senate should be a member of any other of these ten committees, and this, in a modified form, was approved in 1919 by the Republican conference. Now a Senator may be a chairman of only one important committee, and may be a member of no more than two. This will avoid the extreme oligarchic control of legislation in conference which was

possible before the rule was adopted, but there are other grave dangers of abuse.

Successive changes in the rules of both branches of Congress have sought to reduce the powers of conference committees. In the House the report must be printed in the *Record* before it is acted upon, unless it is presented during the last six days of a Congress. In the Senate there is not even this empty safeguard. The conference report is subject to a point of order if the conferees have eliminated anything agreed upon by both Houses, or have inserted new legislation (this was not the rule in the Senate before 1918), but these general formulas are subject to abuse. Senators sponsoring particular measures sometimes do not object to amendments, knowing that they can be eliminated in conference. Thus, in 1916, during the discussion of the Water Power bill, Senator Nelson said that (from his point of view) a proposed amendment was "bad and vicious"; but he added: "We might let it go in and eliminate it in conference." An apparently immaterial amendment may be added by the chairman of the committee with the legislation in charge, for the express purpose of differing with the other House and thus securing the opportunity in conference to add matter, germane to the amendment and consequently proper under the rule, which he did not desire to present in open session. The rules now in force would probably prevent a writing of a new bill such as was done by the conference committee on tariff of 1883, but sometimes curious things happen. For example, the conference report on the War Revenue bill of 1918 exempted congressional salaries for the eight percent on incomes in excess of $6,000. This was new legislation, but it went through both branches almost unnoticed—at last so far as appeared in the debate. On this particular measure the conferees worked eight hours a day for two weeks before they reported. The Senate added 320 amendments to the House bill and receded on only 55; the House gave way on 210 amendments, and the other differences were compromised.

Frequently measures remain in conference for long periods. The Oil Land Leasing Act passed the Senate in January and the House in May, 1918, and went to conference. The report was not made until February 18, 1919, and was then refused by the Senate because it contained new legislation. The measure was re-reported, but Senator La Follette filibustered against it and it went over to the next session. It passed the Senate again on September 3, 1919, and the House on October 30, but was not reported from the conference committee until February 10, 1920. The legislative history of the Water Power Act is equally significant. Conferees on this bill were

deadlocked from September, 1918, to February 26, 1919, when the report was killed by Senator La Follette's filibuster. His speech, by the way, contained a very remarkable analysis of the powers of conference committees. The Water Power bill again passed the House on July 1, 1919, and the Senate on January 15, 1920, but the conference report was not adopted until May 31, 1920. These measures over which a battle has been fought to prevent an unchecked exploitation of the natural resources of the country warrant close study, for nowhere can the economic interests which are concerned by such legislation work more effectively and more securely than in the secret conference committees. The Esch-Cummins law, to give another example, was in conference for two months; and the conferees had enormous powers with reference to the labor provisions on which the House and Senate were in complete disagreement.

The House of Representatives has complained bitterly of the fact that almost without exception the conferences are held in the room of the Senate committee having jurisdiction of the bill. "Why should we go over there to listen to their reason for amending our bill," asked Samuel J. Randall, "when the House asks the conference and holds possession of the papers?" In one respect, however, a recent change in the rules of the House of Representatives has been designed to increase the power of this body and make it more of a match for the Senate. During the Fifty-fourth Congress, Mr. Cannon declared the rule to be "unvarying that the body proposing legislation as a rider upon a money bill must recede if the other body will not assent"; but the rule is broken. In that Congress the Senate added two million dollars of French Spoliation Claims to the General Deficiency bill and the House was forced to give way. The victory of the Senate was not lessened by the fact that President Cleveland vetoed the measure. The House has chafed for a long time at the fact that amendments, subject to points of order if originally offered in the House, are added to bills in the Senate and then retained by the conference committees, the House being forced to accept them or reject the whole conference report. The rule now provides that such amendments must be brought back to the House by the conferees for a vote. This takes from the conference committee the power which it has hitherto had of committing the House to Senate amendments. At the last session of the Sixty-sixth Congress, for example, the Senate added the Muscle Shoals amendment (involving $10,000,000) to the Sundry Civil bill. The House rejected it twice, and the Senate was forced to yield, although before the amendment of the rule, the conference report would probably have been forced through the House with the Muscle Shoals provision included.

Nevertheless, with regard to appropriation, and particularly with regard to revenue, the House is subordinate to the Senate.

The Constitution, to be sure, gives the House the right to originate all bills for raising revenue, but that frequently means—the Tax Revision law is ample evidence—that the House has the right to originate the enacting clause. This measure, as it left the House after a perfunctory discussion of four days, was a series of amendments to existing statutes. The Senate wrote an entirely new law, in the form of 833 amendments to the House bill. The conference committee recommended that the Senate recede in the case of seven amendments; that the House recede on 760 of the Senate's proposals, and that the House recede with amendments in 66 cases. On the important questions of the rate on high incomes, the authority of the conferees was limited. In the House bill the maximum rate was 32 percent; the Senate amendment, forced through by the agricultural bloc, was 50 percent., but the conferees (it was several times stated in the debate) would have been glad to agree on 40 percent., for a majority of them, under the system of appointing conferees, were opposed to the 50 percent. rate which, it was clear, was approved by the dominant opinions in both branches of Congress. But when the House sent the bill to conference, the attempt was made to instruct the House conferees to agree to the Senate amendment. Fearing defeat at that time, the House leaders refused the vote, but promised that, in passing on the conference report, there would be an opportunity of voting separately on this surtax question. The vote as taken was on an instruction to the conferees, not on the report itself, and even the letter from President Harding did not check a sufficient Republican defection to result, in this case, in agreement between the two houses on the schedule. With this exception, however, it cannot be said that, on the controverted points of the bill, the conference committee reconciled differences between the House and the Senate. Rather did the Senate conferees seize the opportunity to make the bill more in accordance with their own views and to retrieve the defeats they had suffered at the hands of the agricultural bloc. Senator La Follette's amendment, providing that the taxpayer should include in his return a statement of his tax exempt securities, was eliminated, and the conferees thus postponed, for a time, a determination of the soundness of one argument of the opponents of high surtaxes. So also the conference report failed to include an amendment allowing inspection by appropriate congressional committees of the tax returns to determine, for example, the need that a particular corporation might have for tariff protection.

So long as the American Government adheres to a more extreme bicameral theory than has been adopted by any other country in the world, the institution of conference committees will probably be necessary, but their perniciousness can at least be mitigated. It is the habit of all legislative bodies to rush bills through with scant consideration, on the closing days of a session. Thus, when the second session of the Sixty-sixth Congress came to an end on June 5, 1920, Mr. Wilson had not signed eleven measures. Nine of these had been sent to him the same day. Three appropriation bills were presented to him on June 4, and two on June 3, and forty-six other laws were signed on the last day of the Congress. The matter is particularly serious during the short session when Congress usually finds it impossible to finish all the Appropriation bills which are the reason for its meeting, and attempts to rush through other important legislation before the time the Constitution fixes for adjournment. There should be rules to prevent this legislative congestion. It might be provided, for example, that neither house could receive a bill from the other after January 15 of the short session, and that all conference reports must be made a certain time before adjournment, or at least be printed before being acted upon. Sessions of conference committees should be public, with record votes, and there should be, both in the Senate and in the House, a greater willingness to send measures back to conference. These would seem to be elementary safeguards and would certainly lessen the danger that conferees would do in conference what they were forbidden, or did not have the courage, to do in open session.

Senator Walsh was probably a little rhetorical when, in the debate on the Tax Revision conference report, he suggested that there is nothing "left for a free people except a political revolution" if a conference committee "completely nullifies the power and voice of the majority." Government by conference committees is never so unpopular that the people get at all excited over it, and, indeed, practically the only criticism of this secret method of agreeing on, and, many times, preparing new legislation, comes from Congress itself. It is there that the revolution should take place.

For a number of reasons the country now holds Congress in low esteem, and while it may be true that the complacence with which the Senate and the House view nullifying action by conference committees is a symptom rather than the disease itself, reform would, I think, be a material factor in arresting the decline of congressional influence.

31. LETTER: J. W. HARRELD TO HON. L. C. ANDREWS[1]

Washington, D. C., Oct. 6, 1925.
United States Senate.

Hon. L. C. Andrews, Assistant Secretary of the Treasury, Washington, D.C.

My Dear General Andrews: With further reference to our conversation by telephone this morning, I desire to state that I have learned from various sources that your new director at Fort Worth, Texas, has called for the resignation of the Rev. Thoroughman of Lawton, Okla., who has been on the force of M. F. Meadows, director at Oklahoma, for some time. Of course, in pursuance of the policy you have adopted not to consult Senators and Congressmen, Mr. White did not see fit to confer with me about it. I did not recommend Mr. Thoroughman's removal because I consider him a very efficient officer and was not consulted about it.

CHURCHES CONDEMN REMOVAL

The churches at Lawton, consisting of some five or six, on Sunday, Sept. 27, adopted, each of them, resolutions condemning the act of Mr. White in making this removal and expressing their utmost confidence in Mr. Thoroughman as an officer. The citizens of Lawton are generally up in arms about it and I am constrained to further insist that he should be reinstated, or else some good cause should be given as to why he should be removed. You have no idea what a furor this removal has raised, and they are charging me with the responsibility for it, as shown by clipping from the local paper at Lawton, which I enclose, and numerous letters which I have received in protest.

I was rather favorably impressed with Mr. White, the director at Fort Worth, when I met him and told him that I would not be unduly active in promoting any candidate for appointment as enforcement officer, but I do insist that neither you nor he should do anything which will injure my standing in the State in which I live and endanger my chances for reelection in the coming campaign.

I therefore, think it would be advisable for you to direct Mr. White to consult Senator Pine and myself about the possible consequences of a removal of an old officer, or the appointment of a new one.

[1] *New York Times,* Oct. 9, 1925.

I had thought I would try not to have anything to do with these appointments or removals, but I find there is no way I can evade this responsibility and I shall continue to exercise my right to express my approval or disapproval of the acts of your department in these particulars. The circumstances in this case show that it will be impossible to keep peace in the Republican Party in Oklahoma unless Senator Pine and myself are consulted about these appointments and removals and I feel it but fair to say to you in advance that we shall expect this courtesy from your department.

Yours very truly,
(Signed) J. W. Harreld.

32. CONGRESS DAY BY DAY[1]

A Daily Record of Proceedings on the Floor of the Senate and House for the Period Dec. 7–22, 1925

Monday, December 7, 1925

Senate:

Charles G. Dawes, Ill., Vice President of the United States, called the Senate to order at 12 o'clock noon, beginning the first or "long" session of the Sixty-ninth Congress. Eighty-nine Senators were present. The oath of office was administered to George H. Williams, Mo., R., appointed to fill the un-expired term of the late Senator Spencer; to Robert M. La Follette, Jr., Wis., R., elected to fill the unexpired term of the late Senator La Follette; and to Arthur R. Robinson, Ind., R., appointed to fill the unexpired term of the late Senator Ralston. The credentials of Gerald P. Nye, N. D., R., appointed to fill the unexpired term of the late Senator Ladd, were referred to the Committee on Privileges and Elections.

The following resolutions were submitted by Mr. Curtis, Kans., R., and agreed to: S. Res. 43—That the Secretary inform the House of Representatives that the Senate is ready to proceed to business; S. Res. 44—that a Committee be appointed to join with a House Committee to inform the President of the United States that the Congress is ready to receive communications from him; S. Res. 45—that the hour of meeting of the Senate be 12 o'clock meridian until otherwise ordered; S. Res. 46—that Edwin P. Thayer, of Indiana, be elected Secretary of the Senate; S. Res. 49—that Edwin A Halsey, of Virginia, be elected Acting Assistant Doorkeeper of the Senate.

[1] Reprinted from the *Congressional Digest,* by permission of the editor.

Mr. Robinson, Ark., D., Minority Leader, requested unanimous consent (which was given) that the record of the special order made in executive session during the special session of the Senate on March 13, 1925, providing for the consideration of S. Res. 5—Swanson, Va., D. (proposed adherence of the United States to the World Court) on December 17, 1925, be printed in the Record.

Mr. Swanson, Va., D., announced that he would address the Senate on December 17 in behalf of S. Res. 5.

Resolutions on the late Senators La Follette, Ladd and Ralston were adopted, and adjournment taken out of respect to the deceased Senators.

House:

The House was called to order at 12 o'clock noon, by William Tyler Page, Clerk of the last House. Four hundred and nineteen members were present. Nicholas Longworth, Ohio, R., Finis J. Garret, Tenn., D., and Henry Allen Cooper, Wis., R., were nominated for office of Speaker. The vote was as follows: 229 for Mr. Longworth, 173 for Mr. Garrett and 13 for Mr. Cooper. Mr. Longworth, having received a majority of the votes cast, was declared duly elected Speaker of the House for the Sixty-ninth Congress. The oath of office was administered to the Speaker by Mr. Butler, Mass., R.

The Speaker administered the oath of office to the Members and Delegates. Mr. Butler and Mr. Griest, Pa., R., qualified by affirmation. H. Res. 1—providing for the election of William Tyler Page as Clerk of the House, and for the election of other officers of the House was agreed to.

Resolutions of notification to the Senate and to the President were agreed to.

By a vote of 208 to 196 the House agreed to H. Res. 6—adopting the rules of the 68th Congress with certain amendments—(one of which provides for setting aside the rule permitting 150 members to order the "discharge" of a committee from further consideration of legislation before it, and substituted a rule under which a majority of the membership may instruct a committee to report out a bill or resolution, subject to parliamentary restrictions).

Resolutions were adopted providing for majority and minority members of the Standing Committees of the House.

Mr. Green, Iowa, R., Chairman of the Committee on Ways and Means, by direction of the Committee reported a bill (H. R. 1) to reduce and equalize taxation and provide revenue. The bill to-

gether with the Committee's report was referred to the Committee of the Whole House.

Resolutions were adopted on the deaths of the following members: the late Representative John Jacob Rogers, Mass., R.; the late Representative Arthur B. Williams, Mich., R.; the late Representative George B. Churchill, Mass., R.; the late Representative Robert Y. Thomas, Jr., Ky., D.

The House adjourned as a mark of respect to the memory of the deceased members of the House and of the Senate.

A total of 2,927 House bills were introduced the first day.

Tuesday, December 8, 1925

Senate:

The President's annual message to the Congress was read by the Secretary.

The President transmitted to the Senate about 1,000 recess nominations.

Agreements between the World War Foreign Debt Commission and the governments of Italy, Esthonia, Rumania, Latvia, Czechoslovakia, and Belgium, were submitted by the President with his approval, and were referred to the Senate Committee on Finance.

Annual reports for the fiscal year ending June 30, 1925, from the Department of War, the Department of Interior, and the Department of Agriculture were received and referred to the appropriate Committees. A total of 956 bills, and 16 joint resolutions were introduced.

After a brief executive session, the Senate adjourned until Thursday, December 10.

House:

The President's annual message to the Congress was read by the Clerk of the House.

Began consideration of the revenue bill for 1926 (H. R. 1) in Committee of the Whole House. Mr. Green, Ia., R., Chairman of the Ways and Means Committee, explained the provisions of the bill.

Debt funding agreements executed by the World War Foreign Debt Commission and the governments of Italy, Latvia, Rumania, Esthonia, Czechoslovakia and Belgium were transmitted by the President with his approval, and were referred to the Committee on Ways and Means.

Adjourned.

Wednesday, December 9, 1925

Senate:

Not in session.

House:

The message of the President transmitting the Budget for 1927 was read and referred to the Committee on Appropriations.

Continued general debate on the revenue bill (H. R. 1). Mr. Hawley, Ore., R., Mr. Rainey, Ill., D., Mr. Garner, Tex., D., and Mr. Mills, N. Y., R., discussed the bill.

Agreed to a resolution (Res. 41, Burton, Ohio, R.) that the credentials of John W. Langley, Representative-elect from the 10th district of Kentucky, be referred to a Select Committee to be appointed by the Speaker.

Adjourned.

Thursday, December 10, 1925

Senate:

The message from the President transmitting the Budget for 1927 was read and referred to the Committee on Appropriations.

The annual report of the Attorney General was received and referred to the Committee on the Judiciary.

Mr. Couzens, Mich., R., from the Select Committee on Investigation of the Bureau of Internal Revenue submitted a report.

Adopted the joint resolution (S. J. Res. 1, Moses, N. H., R.) to continue the temporary postal rates (Sec. 217 of Public Law No. 506 of 68th Congress) until not later than the end of the second week of the second session of the present Congress.

Mr. Harrison, Miss., D., spoke on the cloture rule advocated by Vice-President Dawes.

Mr. Heflin, Ala., D., criticized the cotton reports of the Crop Reporting Board. Mr. Harris, Ga., D., replied.

After an executive session the Senate adjourned until Monday, December 14, 1925.

House:

Mr. Bankhead, Ala., D., took the oath of office.

Continued general debate on the revenue bill (H. R. 1). Mr. Watson, Pa., R., spoke against the estate tax. Mr. Green, Fla., D., criticized the 80 per cent rebate feature of the estate tax. Mr. LaGuardia,

N. Y., Socialist, criticized the proposed lower surtax rates and the reduction in estate tax rates.

Adjourned.

Friday, December 11, 1925

Senate:

Not in session.

House:

The resignation of Mr. Williamson, S. D., R., from the Committee on Rules was accepted.

Adopted concurrent resolution (H. Con. Res. 3, Tilson, Conn., R.) providing for the adjournment of Congress from December 22, 1925, to January 4, 1926, for the Christmas holidays.

Discussed and agreed to the joint resolution (S. J. Res. 1, Moses, N. H., R.) to continue the temporary postal rates until the second session of the 69th Congress.

Continued debate on the revenue bill (H. R. 1). Mr. Treadway, Mass., R., spoke in favor of the bill. Mr. Hastings, Okla., D., reviewed the bill, and protested the terms of the proposed Italian debt settlement. Mr. Ramseyer, Ia., R., Mr. Simmons, Nebr., R., and Mr. Quinn, Miss., D., spoke in favor of higher estate tax rates. Mr. Hill, Md., R., favored the repeal of the estate tax.

Saturday, December 12, 1925

Senate:

Not in session.

House:

Resumed consideration of the revenue bill (H. R. 1). Mr. Garrett, Tenn., D., objected to life tenure of office for members of the Board of Tax Appeals. Mr. Greenwood, Ind., D., spoke in favor of a 50-50 rebate rate in the estate tax to all States irrespective of whether the State collected inheritance taxes. Mr. Chindblom, Ill., R., spoke on the retirement of the national debt. Mr. Deal, Va., D., spoke in favor of a flat uniform tax on incomes. Mr. Berger, Wis., Socialist, said that the proposed bill "will promote the concentration of wealth and hasten the downfall of the system." Mr. Lozier, Mo., D., while favoring the bill, spoke in favor of retaining present estate tax rates. Mr. Gilber, Ky., D., opposed the proposed repeal of pub-

licity of income tax returns and the reduction in the present estate tax rates. Mr. Denison, Ill., R., spoke against the estate tax. Concluded general debate on the bill.

Adjourned.

Monday, December 14, 1925

Senate:

Annual report of the Secretary of the Treasury for 1925 was received and referred to the Committee on Finance.

Executive session was held.

Adjourned.

House:

Mr. Mead, N. Y., D., took the oath of office.

Began reading the revenue bill for amendment. All amendments offered to change the normal income and surtax rates as reported from Committee were rejected.

Adjourned.

Tuesday, December 15, 1925

Senate:

Mr. Smoot, from the Committee on Finance, reported six bills relating to the settlement of indebtedness of foreign governments to the United States, and requested that the bills be printed in the Record.

Mr. Walsh, Mont., D., requested that the Treaties signed at Locarno be printed in the Record, and also as a Senate document. (S. Doc. No. 21, 69th Congress, 1st session.)

Mr. Bingham, Conn., R., spoke on his bill (S. 41) to encourage and regulate the use of aircraft in commerce. The bill was made the unfinished business of the Senate.

Mr. Edge., N. J., D., spoke in favor of the modification of the Volstead Act. Mr. Willis, O., R., replied. Mr. Bruce, Md., D., Mr. King, Utah, D., Mr. Sheppard, Tex., D., and Mr. McKellar, Tenn., D., participated in the debate.

An executive session was held.

Adjourned.

House:

Resumed consideration of the revenue bill. Mrs. Norton, N. J., D., made her maiden speech in behalf of her amendment that the

proposed income tax exemptions be raised to $5,000, instead of $3,500 in case of married persons, and $3,000 instead of $1,500 for a single person. Mr. Rainey, Ill., D., offered a substitute amendment providing an exemption of $2,500 in the case of married persons. Both amendments were rejected. Amendments offered by Mr. La Guardia, N. Y., Socialist, and Mr. Griffin, N. Y., D., providing publicity of income tax returns were rejected. A number of committee amendments perfecting the language of the bill were adopted.

Adjourned.

Wednesday, December 16, 1925

Senate:

Mr. Reed, Mo., D., introduced a resolution (S. Res. 9) authorizing the Committee on Foreign Relations to investigate and report on the general foreign debt situation, and also whether any money or credits had been expended for the purpose of influencing action of the Government of the United States, etc.

Mr. Smoot, Utah, R., requested unanimous consent to proceed with the consideration of the bills authorizing the settlement of the indebtedness of certain foreign countries to the United States. Mr. Reed, Mo., D., objected. Mr. Norris, Nebr., R., announced that he would not oppose any debt settlement made in accordance with the terms of the British debt agreement. Mr. Johnson, Calif., R., and Mr. McKellar, Tenn., D., also took that position. A brief discussion of the proposed terms of debt settlement with Italy and with Belgium ensued.

Adopted the resolution (H. Con. Res. 3) providing for the Christmas holiday recess.

Discussed and passed with minor amendments the bill (S. 41, Bingham, Conn., R.,)—to regulate the use of aircraft in commerce. In the House the measure was referred to the Committee on Interstate and Foreign Commerce.

An executive session was held.

Adjourned.

House:

Agreed to majority and minority assignments of members to standing committees of the House.

Mr. Green, Ia., R., Chairman of the Committee on Ways and Means, stated that his committee would insist upon its constitutional

right of priority in consideration of foreign debt funding bills.

Resumed consideration of the revenue bill. The estate tax provisions of the proposed bill were debated. Amendments proposed by Mr. Rainey, Ill., D., and by Mr. Ramseyer, Ia., R., were rejected.

Adjourned.

Thursday, December 17, 1925

Senate:

In accordance with the order of the Senate agreed to on March 13th, last, the Senate in open executive session proceeded to consider Senate Resolution 5, submitted by Mr. Swanson, Va., D., on March 5, 1925, providing for adhesion on the part of the United States to the protocol of December 16, 1920, and the adjourned statute for the Permanent Court of International Justice, subject to certain reservations, etc. Mr. Swanson spoke in support of the resolution. (The World Court resolution continues the unfinished business in the open executive session.)

Mr. Ransdell, La., D., spoke on the development of water-ways.

Mr. Copeland, N. Y., D., spoke on the coal strike.

An executive session was held.

Adjourned.

House:

Mr. Wilson, Miss., D., took the oath of office.

Continued debate on the revenue bill. Rejected an amendment by Mr. Frear, Wis., R., proposing a gift tax. Rejected amendments by Mr. Huddleston, Ala., D., and Mr. Drane, Fla., D., to reduce the tax rates on manufactured tobacco. Rejected amendments by Mr. Griffin, N. Y., D., to strike out the admission taxes. Rejected amendments by Mr. Hudspeth, Tex., D., and by Mr. McLeod, Mich., R., to reduce the tax rate on automobile parts, etc.

Adjourned.

Friday, December 18, 1925

Senate:

After the conclusion of the regular morning business before the Senate, Mr. Lenroot, Wis., R., moved that the Senate proceed in open executive session to the consideration of the World Court resolution (S. Res. 5). Mr. Lenroot and Mr. Walsh, Mont., D., addressed the Senate in favor of joining the Court. Mr. Borah, Ida., R., Chairman

of the Committee on Foreign Relations, spoke against the proposal.

Resumed legislative session.

An executive session was held.

Adjourned until Monday, December 21, 1925.

House:

Resumed consideration of the revenue bill. Debated proposed rate on distilled spirits. Mr. Green, Ia., R., offered a committee amendment (which was adopted) providing for initial terms of 8, 12, and 14 years, and thereafter 14 years for members of the Board of Tax Appeals. The bill was reported to the House from the Committee of the Whole House. A motion to recommit was rejected by a vote of 147 to 267. The bill was passed by a vote of 390 to 25. The bill provides for tax reduction amounting to $325,000,000. With the exception of several amendments offered by the Committee on Ways and Means, drawn to perfect the language of the bill, and the committee amendment changing the proposed terms of the sixteen members of the Board of Tax Appeals from life appointments to a maximum of 14 years, the bill went through the House in the form in which it was submitted by the Committee on Ways and Means. In the Senate, the bill goes to the Committee on Finance.

Mr. Madden, Ill., R., from the Committee on Appropriations, reported without amendment the bill (H. R. 5959) making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1927. The bill was referred to the Committee of the Whole House.

Adjourned.

Saturday, December 19, 1925

Senate:

Not in session.

House:

Began consideration in the Committee of the Whole House of the bill (H. R. 5959) making appropriations for the Treasury and Post Office Departments. General debate was limited to ten hours. Mr. Byrnes, Tenn., D., discussed the bill.

Mr. Vare, Pa., R., urged the amendment of the Volstead Act by raising the alcoholic content of beverages to 2.75%, and criticized the present law, as unenforceable.

The status of legislation dealing with the coal situation was dis-

cussed by Mr. Black, N. Y., D., Mr. Treadway, Mass., R., and Mr. Wainwright, N. Y., R. Mr. La Guardia, N. Y., Socialist, recommended direct control of the coal industry by the Federal Government.

Mr. Hawes, Mo., D., spoke on Federal encroachment on the rights of the States.

Mr. Gallivan, Mass., D., objected to an appropriation item for prohibition enforcement in connection with securing evidence, and criticized certain activities of prohibition agents.

Mr. Abernathy, N. C., D., spoke on waterway development.

Passed the Senate joint resolution (S. J. Res. 28) declaring Saturday December 26, 1925, a legal holiday in the District of Columbia.

Mr. Tilson, Republican floor leader, and Mr. Garrett, Democratic floor leader, congratulated the Hon. William Tyler Page, the Clerk of the House, upon "his 44 years of continuous service as an employee and official of the House of Representatives."

Adjourned.

Monday, December 21, 1925

Senate:

Mr. Walsh, Mont., D., and Mr. Pepper, Pa., R., spoke on the World Court. Mr. Lenroot, Wis., R., requested that the resolution for adherence to the Permanent Court of International Justice (S. Res. 5, Swanson, Va., D.) and also the statute for the Court be printed in the Record.

Resubmission of the name of Thomas F. Woodlock, New York, and the nomination of Richard V. Taylor, Alabama to be members of the Interstate Commerce Commission gave rise to a discussion of regional representation on the Commission.

An executive session was held.

Adjourned.

House:

Passed a resolution (H. J. Res. 65) for the participation of the government in the Philadelphia conference in 1926, on narcotic education. Mr. Reed, N. Y., R., spoke on the purpose of the conference.

Mr. Snell, from the Committee on Rules reported the resolution (H. Res. 59) to authorize the Committee on Interstate and Foreign Commerce to investigate the production, control and price of rubber and other raw materials imported into the United States.

Continued consideration of Treasury and Post Office Departments

appropriation bill (H. R. 5959). Mr. Madden, chairman of the Committee on Ways and Means explained the provisions of the bill.

Mr. Phillips, Pa., R., spoke on prohibition enforcement.

Mr. Dickinson, Ia., R., discussed various legislative proposals for Federal aid to farmers.

Mr. Begg, Ohio, R., criticized American policy in connection with Philippine Islands.

Mr. Blanton, Tex., D., spoke on his resolution to abolish during peace time all court-martial trials in the Army and Navy.

Adjourned.

Tuesday, December 22, 1925

Senate:

Considered and passed bills on the Calendar.

Mr. Heflin, Ala., D., criticized the operation of cotton exchanges.

An executive session was held.

Adjourned until Jan. 4, 1926.

House:

Special Committee appointed to investigate charges against John W. Langley, Representative-elect from Kentucky presented its report.

Practically completed work on the Treasury and Post Office Departments appropriation bill (H. R. 5959).

Mr. Griffin, N. Y., D., spoke on the expenditures for prohibition enforcement.

Mr. Wainwright, N. Y., R., defended the Mitchell court-martial, and Mr. Shafer, Wis., R., replied.

Mr. Kelly, Pa., R., spoke on the development of commercial aviation and air mail routes.

Adjourned until Jan. 4, 1926.

Beard, (4th Ed.), pp. 222–241.
Kimball, *National Government*, pp. 271–307.
Ogg and Ray, (2nd Ed.), pp. 336–357; 359–382.

VIII

CONGRESS—THE HOUSE OF REPRESENTATIVES

The process of legislation cannot be determined by formal procedure, but rather it grows out of the forces which underlie legislation and make possible its passage. Some theorists have suggested that economic, racial, social, and professional groups might be a better basis for representation than geographical divisions. This has come to pass in practice with the highly-organized groups of lobbyists who have invaded Washington and made themselves almost indispensable to legislators. The latter have turned their attention to the making of so-called "public opinion" and have created in the minds of the people beliefs which but for these agencies might never have existed. They draft laws, pass laws, and enforce laws. Within Congress the committee system has taken over the main debates on proposed measures, and with the aid of the lobbyists and the publicity experts our laws are framed.

Control does not rest entirely in the committees but falls into the hands of the small group of the majority which is dominant in the committees. The caucus system with its power to deprive the insurgent of his committee appointments, and its power to determine the party policy in regard to legislation, has developed to a point where the Speaker's loss of power resulting from the "revolution of 1910" is hardly felt. The Speaker has become an important lever in the machine rather than the machine itself. Procedure in the Senate is less formal, but the control exercised is greater because of the conference committee and the influence exercised by the Senate members of that committee.

Legislative procedure is defined by the rules, but these tell only one-half of the story because of the factors which are behind the scenes.

33. THE SIXTY-NINTH CONGRESS[1]

Organization of the House

Although the House of Representatives of the Sixty-Ninth Congress has not yet been convened [2] the business of organizing the new

[1] Reprinted from the *Congressional Digest,* by permission of the editor.

[2] The first meeting of the House of the 69th Congress was held in Dec. 1925.

House was practically completed before the adjournment of the Sixty-eighth Congress (Mar. 1925). Because of the substantial majority of the Republicans in the next House, the nominations by the Republican Conference are equivalent to election.

The Republicans were particularly occupied with the selection of a new Speaker of the House, the highest office in that branch of Congress, which was left vacant by the retirement of Speaker Gillett upon his election to a seat in the Senate. The contest for the nomination, which lay between Mr. Longworth, of Ohio, the Republican Floor Leader, and Mr. Madden, of Illinois, Chairman of the powerful House Committee on Appropriations, was determined at the Republican Conference held on February 29, when Mr. Longworth was chosen by a vote of 140 to 85, which was later made unanimous at his opponent's request.

On February 28, the Democratic Conference nominated as their choice for Speaker, Mr. Garrett, of Tennessee, the Democratic Floor Leader. Both the Republican and the Democratic Conferences were composed of members elected to the Sixty-ninth Congress, who will be sworn in when the first regular session of the Sixty-ninth Congress convenes. The Speaker cannot be elected until the House convenes, but the Republican majority has already insured the election of Mr. Longworth.

The Republican party officers selected by the Republican Conference are as follows: Republican Floor Leader, Mr. Tilson, of Connecticut; Republican Whip, Mr. Vestal, of Indiana; Chairman of the Republican Conference, Mr. Hawley, of Oregon, and Secretary of the Conference, Mr. Sweet, of New York. All present House officers (not members) were renominated by the Republican Conference, which is equivalent to their election by the House, as follows: Clerk of the House, William Tyler Page; Sergeant-at-Arms, Joseph G. Rodgers; Doorkeeper, Bert W. Kennedy; Postmaster, Frank W. Collier; and Chaplain, Rev. James Shera Montgomery, D.D.

The Democratic Conference retained Mr. Garret, of Tennessee, as their Floor Leader, because of the assured election of his Republican opponent for Speaker, and named Mr. Carter, of Oklahoma, as Chairman of the Democratic Conference, Mr. Hill, of Washington, as Secretary, and Mrs. Nolan of New Jersey, as Assistant Secretary. The Democratic Committee on Committees, which is made up of the Democratic members of the House Ways and Means Committee, has charge of the Democratic committee assignments.

On March 6 the Republican Committee on Committees unanimously adopted a resolution declaring that in making up committee assign-

ments in the Sixty-ninth Congress it would recognize as Republicans only those who supported the Republican national ticket and platform in the last campaign. The result of this action will be to relieve the insurgent Republicans in the House of their seniority positions on the Republican committee lists. A sub-committee of the Committee on Committees was named to arrange the Republican committee assignments, as follows:

Mr. Tilson, of Connecticut; Mr. Madden, of Illinois; Mr. Griest, of Pennsylvania; Mr. Parker of New York; Mr. Begg, of Ohio; and Mr. Newton, of Minnesota. The sub-committee will not report its recommendations until shortly before the Sixty-ninth Congress meets.

34. THE NEXT STEP IN WASHINGTON[1]

RESPONSIVE LEADERSHIP THAT MUST FOLLOW THE FEDERAL BUDGET—A REVOLUTIONARY CHANGE FOR INCREASED EFFICIENCY WITHIN THE CONSTITUTION

By Chester H. Rowell

Swearing at Congress has become a favorite American sport. Considering what to do about it is naturally not so common; but that has not been neglected, either, and there is a fair consensus of informed opinion as to what is needed. Unfortunately, knowing what to do is not doing it. If it were, we should not, for instance, have had the thirty years' lag between the demonstration that we needed the budget and the first step towards getting it. Meetings of experts in Washington, even in 1890, pointed out as well as it could be done today the absurdity and extravagance of our haphazard system of raising and spending money by a dozen unrelated bills from as many separate committees, without unified estimates, and outlined the necessary steps towards coördination, such as private business and all other governments had already taken. Thirty years later, Congress authorized the first of these steps!

The end of the similar lag in the general problem of Congress must be nearly overdue, and an attempt to arouse some active interest in its solution may therefore not be untimely. The purpose of these articles is to be a part of an effort to that end. The case is just as clear and nearly as belated as the budget was. As the source of the fiscal evil was lack of coördination of estimates, revenues, and

[1] Reprinted from *World's Work*, December, 1924, by permission of the author and publisher.

expenditures, so the chief source of the legislative evil is lack of public, responsible contact between the executive and legislative branches of the Government. The remedy proposed is nothing original. It is already in successful operation in all private business and in practically all other governments, and is approved for America by nearly all of those whom scholarly attainments or practical experience have qualified to be regarded as our most eminent experts. It is, briefly, that we bridge the aloofness of executive and legislative responsibility by bringing Cabinet members and legislators face to face, on the floor of Congress, for the transaction of their joint business. The magnitude of the benefits, both to legislation and to administration, as well as to the standing of Congress and the personal opportunities for service and reputation of Congressmen, to be expected from so simple a step, will appear in the course of the discussion.

To begin with, this is no proposal to "tamper with our constitutional form of government." Yet it would be nothing very startling if it were. That has been happening throughout our history. The "constitutional form of government" of 1924 is not that of 1790, nor of 1830, 1860, 1880, or even of 1900, and it will certainly not be the same in 1930 or 1940 unless we now, for the first time, somehow freeze into sudden immobility what has hitherto been a living, growing organism.

IS THE CONSTITUTION RIGID OR FLEXIBLE?

As a written document, the Constitution is altered only at intervals, by formal amendment, but as an operative institution it is changing all the time. Surely the finished fabric of a mighty nation, after a generation of experience and of John Marshall's decisions, was something far beyond the tentative instrument of 1789. The development of political parties added a whole new unwritten article, transferring most of the functions of the Electoral College to extra-legal bodies, created by custom. The establishment of the spoils system under Andrew Jackson and its partial disestablishment by the Civil Service Law constituted practically an administrative revolution and counter-revolution. The budget is now the beginning of a legislative overturn at least as radical. The Civil War transformed the whole relation of state and nation, though its formal amendments affected only the rights of the Negroes. Roosevelt shifted, not for the first time, the center of gravity of government. By turns, the President, the Senate, and the House of Representatives have been the center of power.

No one will pretend that the House of Representatives is now that

center, nor maintain it very strenuously even of the Senate. These articles will describe the decline of Congress, which no one now denies. They will suggest that the situation be improved by the method which George Washington tried. This ought, therefore, to be not shockingly ultra-modern.

We have already seen President Wilson revive the earlier custom of appearing personally in Congress to deliver his messages. If we were to extend the same precedent to members of the Cabinet, the sky would not fall nor the Constitution fail. It would be no greater change of form than the delivery of the President's messages, nor of substance than the budget. And if, incidentally, it bettered the situation of Congress, that is confessedly the one place where improvement would be the most welcome.

When we do our swearing, we swear chiefly at Congressmen. But any one who knows Congress intimately will certify that the chief trouble is not Congressmen, it is Congress. Congressmen are not so bad. There are fine men among them, and it would be easy to get more of these, and abler, if it were made worth their while. The ordinary member is about like your own Congressman, a fairly representative citizen who works hard and thanklessly at the task you set him—which is chiefly to run your errands. Those of us who can remember the Congress of an older and greater day, when it really was something, can testify that most of the members were no better then. The difference was in organization and leadership. Considering the misfit tools and preposterous organization with which they have to work, the wonder is that it is not worse. They are entitled rather to commiseration than to the sort of thing they have been getting. Above all, they are entitled to a chance, by serving us visibly better, also to improve their own situation. Let us see if, by examining how they got into their present depths, we cannot find a way out.

REPRESENTATIVE LONGWORTH'S ANSWER

"I was trying to put the House of Representatives back on the legislative map," said Nicholas Longworth, Republican floor leader, in a speech near the close of the last session defending his course in leading House Republicans contrary to declared party policy. The applause of his colleagues testified to their realization that their House had not been "on the legislative map." Public opinion would not have given even the Senate a much larger place on it.

And yet, nearly forty years earlier, Woodrow Wilson, in his first (and best) book, "Congressional Government," had attributed to

Congress "the predominant and controlling force" in government.

It is said that there is no single or central force in our Federal scheme; and so there is not in the Federal *scheme,* but only a balance of powers and a nice adjustment of interactive checks. How is it, however, in the practical conduct of the Federal Government? *In that, unquestionably, the predominant and controlling force, the center and source of all motive and of all regulative power, is Congress.*

Speaking of "the declining prestige of the Presidential office" he said:

> That high office has fallen from its first estate of dignity because its power has waned; and its power has waned because the power of Congress has become predominant.

Further:

> I am inclined to think, therefore, that the enlarged powers of Congress are the fruits rather of an immensely increased efficiency of organization, and of the redoubled activity consequent upon the facility of action secured by such organization.

These words, written within the easy memory of men not yet old, sound like echoes from another age or the description of some strange and distant land. Evidently, in the interval between the beginning of Wilson's academic career and the zenith of Longworth's Congressional one, something has happened to Congress.

As we shall see, many things have happened. One of them is best illustrated by a comparison of two lists of names, one from the membership of the House of Representatives sitting in 1884, while the young Dr. Wilson was writing his book a few miles away in Baltimore, and the other from the body to which Longworth addressed his apologetic vindication in 1924.

ARE COMPARISONS ODIOUS?

Following are the twenty-five leading members of the House of Representatives of 1884, as determined by committee assignments and public recognition:

John G. Carlisle, Samuel J. Randall, Joseph C. S. Blackburn, J. Warren Keifer, Thomas B. Reed, William R. Morrison, Abram S. Hewitt, William D. Kelley, John A. Kasson, William McKinley, Jr., Frank Hiscock, William S. Holman, Joseph G. Cannon, J. Randolph Tucker, Roger Q. Mills, Richard P. Bland, Nelson Dingley, John H. Reagon, James Wilson, Perry Belmont, Robert R. Hitt;

Samuel S. Cox, Charles F. Crisp, Sereno E. Payne, David B. Henderson.

A few years earlier would have included James G. Blaine and James A. Garfield, and a very little later would have added William J. Bryan, Robert M. La Follette and Henry Cabot Lodge, whose reputations, begun then, have been among the few permanencies of American public life for a generation. Or, if we wish to consider the Senate, such names as George F. Edmunds, Nelson W. Aldrich, William B. Allison, Shelby M. Cullom, Benjamin Harrison, George F. Hoar, John J. Ingalls, Justin S. Morrill, John Sherman, Thomas F. Bayard, Arthur P. Gorman, Wade Hampton, John T. Morgan, Dan W. Voorhees, and many others, at once come to mind.

Following are the twenty-five members who occupy the corresponding positions in the present House of Representatives:

Frederick H. Gillett, Nicholas Longworth, William R. Green, Martin B. Madden, James A. Frear, Joseph W. Byrns, George S. Graham, Ogden L. Mills, John N. Garner, James W. Collier, Henry T. Rainey, Cordell Hull, Daniel R. Anthony, Jr., William S. Vare, Robert Y. Thomas, Jr., Willis C. Hawley, Albert Johnson, Samuel E. Winslow, Gilbert N. Haugen, Stephen G. Porter, Theodore E. Burton, Julius Kahn, Sydney Anderson, Adolph J. Sabath, Charles R. Crisp.

Read these two lists! It will be surprising if you do not find more names on the first than on the second that mean something to you. In other words, there were more men in the earlier Congress whose memory has lasted forty years than there are in the present one whose fame has reached the general reader. And there were certainly three times the first list better known to their contemporaries than the best-known half of the second list is known now.

Spectacular as this decrease of reputation appears, it will not do to assume an equal decline in the quality of membership. Some deterioration in the small group of leaders is undeniable and, indeed, inevitable. You cannot make a job less attractive without attracting fewer strong men to it. But even there it is less in reality than in appearance. There are men in Congress now competent for leadership if there were any place for it; and not all the famous leaders of an earlier day were great statesmen. The writer, who was familiar with the Congress of forty years ago, is witness that some of them were very ordinary men, catapulted into position by the rule of seniority. The ordinary membership, counting the good, the bad, and the indifferent, is about what it has always been. The great change is at the top, and even there it is primarily in organization and prestige, and only secondarily in personality. Yet, taken collectively, Con-

gress has notoriously fallen from the "predominant and controlling force" of Wilson to the vain aspiration to get "back on the legislative map" of Longworth. To paraphrase Wilson conversely, it is now the "declining power of Congress" with which we have to reckon. "That high body has fallen from its first estate of dignity because its power has waned; and its power has waned because the power of the President has become predominant."

A CASE FROM THE REMOTE PAST

It is a long story of a century and a third of the ups and downs of Congress, but the first chapter of it is the most modern, because it comes nearest the present situation and is determinative of the present problem.

Seldom has so momentous a decision been made so lightly as that which first broke the contact of the executive and legislative branches of our government, and thereby turned the young republic down a path opposite to that destined to be followed by the other free peoples of the world. It all happened upon the change of one word in a bill before the First Congress to establish the Treasury Department. Question was raised to the clause authorizing the Secretary to "digest and report plans," and while the stronger arguments favored not merely the "report" but also hearing it in person, jealous fears were also expressed that this might lead to invasion of the prerogative of Congress. A relatively obscure member, Fitzsimmons of Philadelphia, apparently with no more far-seeing motive than to calm the feeling in the debate, suggested that the word "report" be changed to "prepare" and on this suggestion James Madison made an unwontedly non-committal speech. By contrast with his aggressiveness just before, in supporting the authority of the President to remove appointees, he became curiously mild on the proposition of having Hamilton on the floor, where he himself had so far been the spokesman of President Washington. The House acquiesced without division, and at the next session, after further discussion, Hamilton's plans were received in writing. As Professor Henry J. Ford says:

> Gibbon remarks that the greatest of theological controversies, which rocked the Roman Empire and affected the peace of millions, turned on the question whether a certain Greek word should be spelled with one diphthong or another. A like disproportion between the vastness of results and minuteness of verbal distinction is exhibited in this decision of the House. The change of "report" into "prepare" threw up a ridge in the field of constitutional development that has affected the trend of

American politics ever since. This is the explanation of a problem of comparative politics that has excited much wondering notice: why is it that alone among modern representative assemblies the American House of Representatives tends to decline in prestige and authority?

At the same session the Senate, on a similar point of dignity, practically abrogated the "advice" half of its treaty-making prerogative. Secretary of War Knox had secured agreement to terms of peace by the Creek Indian chiefs, whose tribesmen had been making trouble in the South. Acting on his understanding of the intent of the framers of the Constitution, over whose deliberations he had presided, President Washington appeared in the Senate to introduce General Knox, who, he said, would explain the negotiations. Instead of hearing the Secretary, Senators called for the reading of the documents and finally moved to refer the whole matter to a committee. Washington was visibly impatient. "This defeats every purpose of my coming here," he said, explaining that he had brought the Secretary of War to give any necessary information and protesting that he was delayed and could not go on with the matter. Senator Maclay relates in his diary: "A pause for some time ensued. We waited for him to withdraw. He did so with a discontented air." Washington took the hint and never returned. In future, the President was to negotiate treaties without the "advice" of the Senate, and the Senate was to determine its "consent" without consultation with the President or his Cabinet.

On this small foundation, not of the Constitution, not of statute law, not even of a rule of the Houses, but of a precedent of procedure, rests the most distinguishing peculiarity of the American process of government—the lack of any public contact on the floor of Congress between the legislative bodies and the heads of the executive departments. Alone among governments, we lock up our Cabinet officers in their respective bureaus and never let them show their faces in Congress. From Jefferson until Wilson the same thing was true of the President. But when the first Chief Executive who was also a professional historian revived the historic precedent, it met with instant approval. It would now be nearly as simple to extend the custom to Cabinet officers, and much more important; for they would come, not for ceremony, but for business.

The consequences began at once. One of them, the ups and downs, and final decline of Congress, we shall have occasion to illustrate further. The other, the substitution of bossism for leadership, was immediate and complete.

Hamilton's plan finally passed but not on its merits. On these,

it was first lost. Vital as it was to the solvency, and therefore to the permanence, of the Republic, what passed Congress was a sordid real-estate deal.

There was a long and pitiful debate, characterized chiefly by obliviousness to everything in Hamilton's report. Its perusal is not recommended to those who wish to idealize our forefathers. Finally the bill failed of passage by the narrow vote of 29 to 31. Some opposition may have been due to distrust of Alexander Hamilton by the more democratic faction, but even this would not have been applied to this measure in the presence of Hamilton. His instant interposition of facts would have shamed the futile debate into relevancy and intelligence. By argument and leadership he would have secured at least the two votes needed and probably many more. Instead, he won by other and less nice methods. The sections of the country were still bickering over the location of the permanent seat of government. Hamilton first tried to bargain with the Pennsylvania delegation, but they were split between two sites and the deal fell through. Jefferson came to his rescue and made a trade with the Virginia delegation for what became the present site of Washington, on the Potomac. So the finance bill was reconsidered and passed.

"INVISIBLE GOVERNMENT" BEGINS

This is ancient history, but its results present precisely the most pressing problem of today. "Invisible government" began at that moment. Executive and legislative responsibility were placed permanently at arm's length. Between the sort of leadership Alexander Hamilton or Thomas Jefferson might have established on the floor and the sort of control they did exercise from the lobby the first choice was final. It determines to this day the method by which we are governed.

Lacking coördinated leadership, we have developed alternate dictatorships. When the executive has controlled, as it did in the earlier and now does in the latest period, it has done so irresponsibly, by other methods than argument.

When the legislative branch was dominant, as it was in fluctuating degrees through much of the middle period, its power rested in its leadership. But every leadership developed into bossism, and the history of the organization of congress is largely a chase around the circle, always fleeing from the boss and never arriving at the leader. Responsible legislative leadership is the one thing which our system has never developed.

Leadership is responsible, legislatively, if it is the organ to make

effective the will of the majority, and holds its authority only while it retains the confidence of a majority. We have never had that. The Speakers, when they led, though chosen by the majority, proceeded to impose, not its will, but their own, on the House. The theoretical right of an opposing majority to remove them was never exercised, and so never became a practical condition. Committee chairmen, chosen mostly by seniority, do not necessarily represent the majority of the House, or even of their own committees. They retain their separate "leaderships" even when nobody follows them. Collectively, they represent nothing. They are not organized as a group, to present a unified policy. The unifying force has been the Speaker, the Committee on Rules, or a steering committee, and its chief purpose has frequently been, not to represent, but to thwart, the will of the majority. Bills have been held up for four years which it was known would pass instantly if brought to a vote. Such leadership is not responsible.

EXECUTIVE POLICIES ON TRIAL

Executive leadership is technically "responsible" to the legislative branch only if its members must resign when their measures are defeated. No one is proposing that for America. But Cabinet officers could be responsible in just as real—and more American—a sense if they were responsible to the President and to each other for presenting a common policy, and if they must maintain that policy openly, before Congress and in the sight of the people, by argument rather than by lobbying, and take the consequences to their own prestige of their successes or failures. They need not resign if Congress disagrees, but if one of them proves incapable of team work with the President or his fellows, or if he chronically loses in Congress where better leadership would have won, he will soon disappear.

This sort of responsibility, of either executive or legislative leadership, we have never developed. And because of that failure, "Alone among modern representative assemblies, the American House of Representatives tends to decline in prestige and authority." As Justice Story says in his "Commentaries":

> "The Executive is compelled to resort to secret and unseen influences, to private interviews and private arrangements, to accomplish its own appropriate purposes, instead of proposing and sustaining its own duties and measures by a bold and manly appeal to the nation in the face of its representatives."

From the beginning, the varying prestige of Congress has depended on the few men in control. The Congress of 1814, for instance, was one of the most helpless, and that of 1815—composed largely of the same persons—one of the most active Congresses on record. The difference was that one year Henry Clay was in Europe negotiating the peace treaty, and the next year he was back in the Speaker's chair. The earlier Congresses were divided into "Administration" and "anti-Administration" factions. The important policies were suggested by the President and their fate was regarded as his victory or defeat. But from 1811 to 1825, under Clay, the House of Representatives was the center of government.

Soon after, Clay went to the Senate, and Andrew Jackson as President dominated everything. After Jackson's time, until Lincoln, Presidents were mediocre and Speakers weak or neutral. The bone of contention between North and South became the Senate, where power now centered. Webster, Clay, and Calhoun, and after them Douglas, Seward and Sumner towered over Presidents like Tyler, Polk, Fillmore, Pierce, and Buchanan. After Lincoln, Speakers Colfax and Blaine restored the House to increased measure of power which, growing under Randall and Carlisle, culminated in Reed, and was not entirely lost under his successors until Insurgency deposed Cannon and, by ending bossism, extinguished the House. Since then the President has been regarded by the people as the leader, and they have looked to him not merely to execute the laws, but also to propose them. The principal function of Congress, according to this view, has been to resist, and most of this has been exercised by the Senate.

The past forty years have constituted one complete cycle. Forty years ago the House of Representatives had two Masters—Speaker John G. Carlisle and Samuel J. Randall, Chairman of the Appropriations Committee. Randall's high tariff views had prevented his reelection as Speaker on the return of his party to power, but he could not be denied his former committee chairmanship, the post of power on the floor. There he successfully opposed his own party on the tariff and was accused even of overriding the Senate by holding back appropriation bills. He certainly used these bills to control other legislation in the House. It was not enough for a member to arrange with the Speaker for recognition on his pet bill. He must also "see" Randall, or a privileged appropriation bill would be clapped in the way. In revolt against this dictatorship, the following Congress broke the single control of appropriation bills by Randall's committee and distributed them among thirteen committees. How many pork-barrel billions this change has since cost can never be counted, but

at least the member from the Eighteenth Arkansas with a public building bill could no longer be bossed by the Chairman of the Appropriations Committee.

THE SPEAKER AS LEADER AND AS DICTATOR

The only effect, of course, was to make the Speaker sole boss. His leadership, too, became dictatorship. He appointed committees which would report the bills he favored and bury those he opposed. He recognized whom he pleased. A member who had not arranged for recognition might prance for hours just in front of the Speaker's desk, as one spectacularly did, pleading, shouting, and gesticulating, and finally tear up the bill and cast the fragments at him, without ever "catching the Speaker's eye." Even so mild an autocrat as Speaker Henderson formed a kitchen cabinet of trusted friends, to one or more of whom he referred each bill on which recognition was sought. If their report and his opinion were adverse, the bill never got on the floor. "I determined when I became Speaker," he said, "that no legislation should be enacted by the House which was not for the public good, if its enactment could be prevented by the exercise of care on my part." This may have been benevolent, but it was guardianship, not leadership.

The Speakership and the power of the House reached their culmination under Speaker Thomas B. Reed. Reed himself referred to his office as "having no peer and only one superior." Indeed, the "superiority" even of the Presidency was in dignity not in power. From Reed through Cannon was twenty years. Then Insurgency rose and cast out what was left of the autocracy. Shorn of his committee-appointing power, the Speaker became a moderator. What authority had not already passed to the Senate and the President was now absorbed by them. The House, unbossed, became also unled—and negligible!

BEWARE THE BOSS!

But now the whirligig of time has brought back the exact technical situation of 1884. The budget system necessarily restored the long-scattered money bills to the single Appropriations Committee, which alone could provide unified legislative consideration of the now unified executive estimates. This places in the hands of Charman Martin Madden, unchecked now even by the Speakership, the very tools which made his great predecessor Randall master of Congress. It is only fair to add that Mr. Madden emphatically disclaims any in-

tention of using them for this purpose. He is of the era that imagined bossism dispensable. But the test will come when Congress itself is faced with the dilemma whether it shall ask Madden to boss it from the inside or submit to being bossed from the outside by Budget Director Herbert M. Lord. Then, if it follows precedent, Congress will start to chase itself around the same aimless circuit for another forty years—fleeing, not toward any goal, but only away from one boss after another.

That circuit arrives nowhere. The only escape is over the fence. Congress has run from bosses all its history, and never got away from them. The only experiment it has never tried is the one to which all other experience points—to transform irresponsible bossism into responsible leadership, and thereby make it a good instead of an evil.

Anyhow, the budget presents a new situation, whose consequences Congress had scarcely begun to realize. And, not matter what else has to yield—the budget will not budge! War taxes guarantee that. Haphazard wastage will never again seem cheaper than the trouble of curing it. Even if, as some members fear, it involved the suicide of Congress we might suffer that suicide, but not the wrecking of the budget. That is not longer debatable.

ANOTHER DICTATOR

Already the consequences of the budget in the executive departments have been revolutionary, not merely in fiscal administration, but also in personal dignities and procedure. The isolation between departments is broken. Cabinet officers are at the beck and call of a subordinate of one of them, whose orders take precedence over their own, in their own departments. The Director of the Budget is ostensibly a bureau chief under the Secretary of the Treasury. If he wants to see his own chief and the Secretary of State on an interdepartmental matter, he does not go to see each of them. He calls them together to see him, not in his office, but in the Cabinet room at the White House. If he and Secretary Hoover both call at once for Hoover's chief clerk, the clerk goes to the Budget Director first. Twice a year, all the responsible officials of all the staffs meet in one room, under the chairmanship of the President of the United States, while the Budget Director lectures them and more than hints that their retention and promotions will depend on carrying out his policies. The Coast Guard wants certain boats which the Navy declines to give up, the Budget Director calls the Secretary of the

Navy or his first assistant, and gets him to change his mind. If an admiral stands on his dignity and refuses to obey orders except from his superior officers, the Budget Director fills out a blank order already signed by the President and hands it to him. If the Budget Director thinks that the Treasurer of the United States ought to change his century-old way of keeping books, he tells him so in a public speech, in the presence of all the departments.

These are not fanciful hypotheses. Each of these incidents actually happened. Naturally, it took a bold and picturesque personage like General Dawes to establish such precedents. But also, it would have been impossible and intolerable if this new authority had been personal and irresponsible. Only because the Budget Director immediately represents the President and is responsible to him do his superiors in rank accept his coördinating functions.

The more spectacular of these innovations are not needed in Congress, but one of them—the bridging of traditional isolation—is imperative if the budget is to be a budget and Congress is to remain Congress. Authorities and experience agree that the only effective budget is an executive budget. The legislative branch may accept, reject, or amend a budget, but it cannot *make* one without sacrificing both efficiency and economy. Whole books could be (and have been) written in elaboration of this one sentence. But this means that those who make and are to administer the budget must have opportunity actually to present and defend it before Congress, and not merely in a secret committee thereof. Committee consideration and report will of course still be necessary, but the committee must not be permitted to usurp the functions of Congress. If it does, either the executive budget disappears into the committee's hopper and what actually gets before Congress for decision is the committee's budget and not the executive's, or else the executive is reduced to do by lobbying what it ought to do responsibly and openly.

CLEANSING POWERS OF SUNLIGHT

If the committee recommends cuts which the departments do not accept the two should have it out, openly, before Congress. But much more insidious are committee increases. These are forbidden in England, by the oldest rule of Parliament, and they will some day have to be limited here; but meantime the best cure for them is daylight. If a department head reports that he needs $750,000 increased salaries in a certain service, to retain indispensable men, but that he will make the entire increase within less than the present appropria-

tion if they will allow him to rearrange men and salaries, and the committee insists, instead, on giving him the $750,000 additional, he ought to be permitted to say so, publicly, to Congress, and let Congress take the responsibility of deciding in the sight of the people. If the Senate committee insists on slipping in through a deficiency bill six reclamation projects, whose costs and probable returns nobody has estimated and which the reclamation service has not asked for and does not want, the Secretary of the Interior should have opportunity to say so out loud, and let Congress decide openly, knowing—and knowing that the people know—exactly what it is doing. Both these are actual instances, and they could be multiplied indefinitely.

A budget made in secret committee will never be free from log-rolling. And a budget which a committee takes the whole session to *make,* and only reports out in bare time to drive through in the final rush, will never be really debated by Congress or understood by the people. Let the executive both make and present a real budget, and there will be plenty of time to discuss it. The debates of Congress will become the most interesting thing in America and those who shine in them will be the best-known men in America. A career in Congress will be worth while to its members, because it will be worth while to the people. The thing can be done! It is done already in every other popular national assembly in the world. The alternative is either the failure of the budget system, or its control by secret executive bossism and lobbying, to the further and final obliteration of Congress from public significance and respect.

Since the first debate, in 1789, there have been arguments enough in favor of admitting Cabinet members on the floor. Some of these, as well as some of the difficulties and absurdities of the present system, will be presented in subsequent articles. But arguments are not enough. Things are not done because a case can be proved for them, but because there is a practical emergency, which they are needed to meet. What is sought to be shown, by this all-too-brief account, is that the budget, the newest and greatest thing in American government, presents such an emergency. Until now, it would have been a good thing to do. Now, it has to be done!

Future articles will attempt to show wherein the present system fails to work, or works with unnecessary difficulty, and to point out how the proposed innovation, slight and simple as it is, would smooth the ways.

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36. THE THIRD HOUSE OF CONGRESS[1]

By Theodore M. Knappen

I

While academic discussion of occupational representation in legislative bodies goes on, occupational control of governments is being achieved. In Russia the manual workers are in control. In the United States the farmers are in the saddle at the moment; tomorrow it may be organized labor or finance or industry. Everywhere legislation is the incidence of conflicting occupational interests. Sectional interests, on which territorial representation in legislative bodies is based, are giving place within most established nations to economic group interests.

In the United States it is no longer the North against the South

[1] Reprinted from the *Century Magazine,* April, 1922, by permission of the author and publisher.

or the East against the West, but each bread-earning pursuit for itself, regardless of region. Legislatures, it is true, are not yet composed of duly chosen group representatives, but they are the battle-ground of those interests. The latter are the real power, and legislators their creatures. Now one group, and tomorrow another, intimidates Congress, and legislation is a crazy-quilt expression of class conflicts. There is no balanced program of legislation, but merely the record in statutory enactments of the rise and fall of the political influence of occupational interests. We have a sort of government by occupational tyranny, which may yet give place to occupational democracy, wherein the group interests will govern in conference and by compromise through their duly elected representatives instead of by scrambles to wrest a sectionally elected Congress from one another, as at present. The constitutional form of government may be changed to effect this representation, or Congress may become such a rubber-stamp as the College of Electors, and we may get balanced occupational rule and representation without recording it in the organic law. Just as parties, and not the electors, choose Presidents, so an extra-legal parliament of business may make the law that Congress perfunctorily enacts.

In recent years the general and particular organization of the people of the country according to occupation or group interests has proceeded at such a pace as to cross-section the whole structure of the nation with intimate personal-interest affiliations that tend to subvert regional affiliations and interests of a traditional or sentimental nature. There are more than 5500 such groups in the United States. They, instead of political subdivisions, have become the real structural units of the nation. The resources of many of these organizations are sufficient to provide for annual expenditures mounting into the millions. Even the farmers have organizations with total incomes in excess of five million dollars, of which one association alone has about half a million annually for national promotional work. Instead of level dues, the revenues of some are a fixed percentage of the amount of business done by the members. The latter regard their associational contributions as important and necessary as advertising. Each concern fights its own battles for patronage, but the central organization directs the contest of group against group and for a larger place in the national sun. Concrete wars against clay, shingles against composite roofings, butter against oleomargarine, coal against oil.

So far has this new grouping progressed that the altruistically inclined deplore it as one of the chief obstacles to the attainment of the common good. It has had the effect, they complain, of making

the people provincial and insular in an economic sense. Each small or large occupational group lives its life within the walls of its business interest, views every public problem from the point of view of that particular interest, and rarely seeks particular benefit from the promotion of the general good. Behind each trade grouping and the endless self-intensification of its promotional work are one or more trade journals, which constantly emphasize the group view of every industrial or political project that comes to the surface. These journals are the trade Bibles, and their readers find in them perennial encouragement of their selfish and narrow views. Today a large portion of the population considers every public question from the point of view of the multitudinous group interests and without yielding in the least to sectional or general considerations. The steel manufacturer is for steel whether you find him in Colorado or in Pennsylvania, the stove man is first of all for stoves; and so it goes throughout the country, cutting across representation in Congress, which is considered by all the groups as nothing more than a national directorate of business.

But Congress continues to be elected by States and districts, and the occupational interests, often large in the aggregate, but weak by geographical sections, find themselves, according to their ideas, improperly represented in the national directorate.

2

To overcome this situation of an industrial nation not wholly directed in the industrial interest, the group business interests have tended more and more to concern themselves with affecting congressmen after election than by means of elections. The perfection and number of their organizations, which have grown up without conscious thought of direct political action, have placed an effective instrumentality for this purpose in their hands. Not being able in any large way to send their own group representatives to Congress, they nevertheless send them to Washington. There have always been courtiers where there are courts and lobbyists where there are legislative lobbies. In former times the lobbyist at Washington was either a migratory bird, coming and going to work for or against measures affecting his special group interests; or, if resident, his attachments, like those of a lawyer, were transitory, his services as a professonal manipulater of congressmen being at the disposal of the largest purse.

The old-time lobbyist was likely to be frankly the delegate of a single corporation, and his appearance was often as much in the

open as his arguments were confidential and mercenary. The independent or professional lobbyist has not entirely disappeared even in these days, though he is apt to disguise himself as a lawyer (frequently a "lame-duck" congressman), with permanent offices in Washington, or as a publicity agent; and he experienced a lively recrudescence during the war, when billions were flowing where thousands had formerly trickled. The individual business ambassador in Washington nowadays is apt to be more concerned with the administrative than with the legislative side of government, with claims, with contracts, with income-tax negotiations, etc.

The real lobbyists of the time are the officers of the great national organizations, some industrial, some commercial, some professional, some scientific, some reformative, some religious, and some merely faddist, all of which have come to find that in some fundamental ways Washington is even more of a center of the non-political cohesions than New York or Chicago. Unconsciously responding to the workings of group interest in seeking their legislative or administrative ends, occupational associations are more and more making Washington the occupational as well as the political capital of the nation. About one hundred and fifty powerful national associations of one sort or another now have Washington offices, and in the case of perhaps fifty the office in the capital is also the national headquarters.

It is impossible to ascertain how many other associations are represented in Washington as clients of publicity and information agents, and by attorneys whose practice consists largely of representation of great corporation or group interests in their contacts with the National Government, but it is a very large number. Lynx-eyed watch is kept on every committee of Congress; every line of the Congressional Record is minutely scanned. At the slightest sign of danger or benefit there is a swift and silent mobilization of the legislative guards of business. Hopeless are the distant and unrepresented.

Business interests that are not regularly represented in Washington subscribe to informational services, which keep them minutely informed of everything that takes place in Washington that may in any way affect their affairs. Some of these services even undertake a sort of card system of government officials, after the manner of the system the German general staff had of French officers, in order that the business man who comes to Washington on some "deal" may be fully informed of the personal equation of the men with whom he has to transact his business.

Each Washington representation of a group, even though it be

little more than self-elected, always speaks with an assumption of full authority for the whole group. The congressman is perpetually bombarded with petitions, solemn warnings, arguments, and menaces from these groups, which in the aggregate have at least a pretense of right to represent every commercial and industrial interest of the nation. As America exists for business above all things else, it is no wonder that the congressman believes that the voice of the delegates to Washington is the voice of the people. The people is a vague conception. There is none, politically in the voteless District of Columbia, and the masses are far away from Washington; and as a national aggregate, as distinguished from a group, a people is inarticulate. The groups are articulate, vociferously so.

Take the Chamber of Commerce of the United States for example. It is the federation of the local chambers of commerce throughout the country. It undertakes to speak for the business community of the nation, and avowedly seeks nothing less than the national "integration of business." It issues frequent composites of national business opinion, obtained by questionnairies sent to its member bodies, which are put forth as the solemn and deliberate voice of that portentous thing, American business. It has its headquarters in Washington, and is about to erect a marble palace that will be a sort of federal capital of integrated business. It publishes a bright and readable magazine, "The Nation's Business," which is widely read. This powerful organization has only to push the button that closes the circuit of its ramifications, and forthwith American business, or something that sounds convincingly like American business, emits a terrifying roar of dissent or an unctuous purr of approval. Several thousand newspapers print the record of its expression, business men gravely consider it, and forthwith the telegraphs and the mails and the telephones bring back the approving echo to a congressman who is striving to represent his people, if he can only find out what they want. Likewise the American Federation of Labor has its own capitol building in Washington, housing ceaseless activities that ever tend to concentrate the power—the favor and the menace—of organized labor in Congress. The farmers also are about to build one. These three executive domiciles will be more truly capitols to the three dominant groups of business, labor, and agriculture than the domed capitol that has long symbolized national unity and power.

3

As Congress, in both chambers, really acts in committee and merely talks or approves in body, the group and special interest

organizations have a tremendous advantage in active participation in legislation. Their trained secretaries or managers, their economists, their statisticians, their press agents, their lawyers, are masters of all things relating to their affairs. Each group knows everything about its own business, whereas the tired, hurried, and distracted congressmen usually know little of any one subject. When hearings preparatory to legislation are held by congressional committees, the ignorant members are confronted by experts in knowledge and experience, adepts by lifelong exercise in special pleading. Humbled by their manifest ignorance, the committeemen are too often inclined to consider the voice of the specialist as the voice of truth, if not of the people. Any citizen has a right to discuss his affairs as related to legislation with any congressman, and in these dialogues the trained representative of special interests shows to even greater advantage than before committees. Personal canvasses of the entire membership of Congress by these organizations are not uncommon, and there is many a member of the unchambered occupational third house of Congress who knows better than members of the recognized houses or newspaper correspondents what is the attitude of a majority of Congress on many of the important questions before it.

To manipulate legislation at Washington nowadays one does not waste time on personal appeals to members of Congress or in interviewing the nominal leaders of the House and the Senate. Rather he seeks out the legislative agents of a few powerful occupational groups, and if he can interest them, his work is accomplished. There is a distinct tendency for the representatives of apparently conflicting interests to adjust their differences and shape their programs among themselves instead of in Congress. The more this tendency develops, the more Congress becomes a rubber-stamp.

Rather curiously, it has remained for the long-unorganized and nebulous farming interest to be the first of the group interests to come into the open and round up and brand its representatives in Congress. The agricultural bloc, which now unquestionably dictates national legislation, is not the result of a spontaneous movement of congressmen, but is the direct creation of the farm organizations, particularly the American Farm Bureau Federation. These organizations rather bluntly told the representatives and senators from agricultural districts that they must work and vote for certain class legislation. The result is today that we have about one hundred representatives and twenty-five senators who are solidly for the agrarian legislative program, and frankly so. This bloc is large enough to get what it wants or create an impasse. Congress obeys or is held up. As there is no other large, coherent class group in Congress,

the farmers are getting what they want with astonishing celerity from an indolent Congress. The tax and tariff bills may lag, but the farmers get through laws that restrict the packers and the grain exchanges, place the War Finance Corporation at their disposal, divert $25,000,000 more from the treasury to the land-loan banks, increase the rate of interest on government debentures for these banks, and at the same time shape taxation and tariff to their liking.

The farmers are now unblushingly demanding that Congress shall give them the unrestricted right to unite and combine in the sale of their products, the anti-trust laws to the contrary notwithstanding. This is a hard dose for the legislatively unorganized interests to swallow, and they are putting up a fight. But they want legislation of various sorts, which the farmers oppose; therefore there will presently be some sort of log-rolling trade.

So the farmers control, and for the time the real Capitol and the real White House are not at each end of Pennsylvania Avenue, but on the second floor of the Munsey office building, where Mr. Gray Silver, the legislative agent of the Farm Bureaus, has his offices. Little is done on Capitol Hill that is not first approved there, and it is the weekly conference of the bloc members with the farmers' agents that determines legislation, and not party caucuses, party leaders, or even the administration itself. There are forty million persons in the United States who are engaged in gainful occupations. Through the surreptitious entrance of occupational interests into legislative counsels the six million group of farmers now dictates. The rest are relatively inconsequential, because they have not yet been bold enough to choose or designate their congressmen and make them stand and deliver. Whether the farmers use their power for the general weal or not, the fact is that we have here occupational dictatorship.

4

Long before a projected bit of legislation comes to a head, the interests affected know where every congressman stands, and take steps accordingly. I here use the word "interests" not in the offensive sense of something mysterious and powerfully inimical to the popular interest, bent upon extracting some substantial preference from Congress, but rather as being made up of all of us, according to our business associations. There is no corruption in all this, and very little secrecy. There is a bill before Congress, which reflects the fear of elected legislators of the growing power of the unofficial lawmakers, to require the members of the third house, the occupa-

tional representation house, to register themselves as lobbyists; but there would appear to be little need of formally registering men who frankly and proudly tag themselves.

The paid lobbyist of a single great coal corporation, or even of the United States Steel Corporation, would not get far in these days. A man would be ashamed to say that he was working as a lobbyist for a single corporation, but he takes pride in being a representative of the National Coal Association or the American Iron and Steel Institute or the Chemical Foundation or the Petroleum Institute or the Railway Executives. He would be ashamed to say that he was a paid lobbyist for Armour, but he is proud to represent the Institute of American Meat Packers. He does not work in the dark, at least not ostensibly. He proclaims himself for what he is. This is a business country; business is the people, and he as an authorized representative of business speaks to the formal legislative body the legislative will of the district of coal or the constituency of steel or the state of copper. Congressmen being chosen as representatives of so many political noses inclosed by imaginary boundary-lines are archaic, if not obsolete, in his view, when the noses necessarily have become industrial in an industrial community. Therefore the necessity of a third house, which represents actuality instead of tradition, as a means of guiding the two houses that must, in conformity to the Constitution, cast the deciding votes.

There is no conflict between this view and the frequent complaint of business men, jealous of their independence, that the Government is too much occupying itself with curbing and hobbling regulations and restrictions of business. On the contrary, if the coal-mine operators or the packers or the railways find themselves in the meshes of strangling laws, it simply means that other business has obtained control of the law-making agency and is using it to protect itself from what it esteems the encroachment of the penalized business in its own field. The repression of the packers means that the business of agriculture has been more successful than that of packing in advancing its interests through legislation, and is also a reaction from a time when the unorganized agricultural group was at the mercy of the packers. The rout of the Plumb plan for "democratic operation" of the railways means that the business of owning the railways is more potent in Congress than the business of working on them. Business is in control of government now in a bushwhacking and guerilla way. Many independent bands overrun and harry the Government, but as yet they are without a common control.

Hence, although government has become economic, it is without a fixed policy, but oscillates like a weather-vane according to the group

control of the day. At one moment organized labor is on top, at another time manufacturing, then agriculture, and so on. Business has not yet reached that stage of evolution of its power when the various occupational states that compose it have attained the point corresponding to the time in our political evolution when the thirteen colonies were willing to sacrifice some of their cherished powers and some of their commercial advantages for the general welfare of the federation. Business men do not appear in great numbers in the House or the Senate, but industry finds a way to make the laws. The college of electors was designed to be a body of wise, elder statesmen who would confer without prejudice or passion, and in cool judgment select the most suitable supermen for President and Vice-President of the United States. In fact the electors are nothing but human tickets who count themselves according to the names of the candidates with which they are tagged, and thus give us the President and Vice-President chosen by popular vote, a state of affairs that would make Hamilton turn in his grave. The Supreme Court was intended to be severely and exclusively juridical, but it has turned out to be a supreme legislative body, it and not Congress being the interpreter of what Congress says.

5

The British monarchy was, in fact, impotent long before historians perceived that Parliament was supreme. The old form survives its loss of potency, and "George Rex" is still stenciled on physical instrumentalities of the British Empire throughout the world, though the king and emperor as a person is merely a symbol, an heirloom of a forgotten age and system.

The British monarch as an executive had virtually ceased to be before our Revolution, but so powerful is appearance and form that our constitution-makers thought they were copying in republican form the balanced legislative, judicial, and executive functions of the British political system, though Parliament already had largely absorbed all three. Profound changes in the substance of institutions and morals have often come unpromoted and unheralded while the form and customs have remained unchanged. Such a submerged revolution may be going on now to meet the insistent requirements of a national life that has become industrial rather than political.

So far the third house is not united. The representatives of the groups that compose it have championed the particular causes of their groups and have fought against one another, with the result that some very powerful ones, such as the meat-packers and the coal-

operators, have nothing to show for their intense and intensive activity in shaping legislation. It remains for business men, getting into the government by a means unknown to the Constitution, to unite for the purpose of controlling government for the general welfare of the aggregate of the groups.

It is by no means impossible that they will yet endeavor to unite and, instead of quarreling with one another, seek to shape all legislation with an economic bearing for the common good. The regulation of the business of the country by the War Industries Board during the war was a lesson in the possibilities of the reconciliation of particular interests for the good of all. It opened the eyes of business men to the fact that the attainment of a common good is often of more value than that of a particular good. Mr. Baruch, as industrial dictator, showed them the huge interdependence of business, and gave them unforgotten lessons in group control and discipline. Now that business in some form is aggressive in directing Congress rather than in electing it, it is not inconceivable that it may recall its war experience, frankly declare that the Government is now economic, and strive to unite its forces in a great legislative committee that will become in a very real sense a third and dominating house. Something of that sort would now seem to be the only way out of a condition in which all legislation of economic importance merely represents victory or defeat for some special interests. Today Congress seeks to legislate while being torn by a pack of ravening wolves, which consume it and one another. Indeed, the plight of Congress is that of the nation. So distracting and so destructive of the common good has become this bloodless war of the interests, each intent on its own objective, that Herbert Hoover was recently moved to say:

> During the last twenty-five years we have seen the extraordinary growth of great national associations, covering our entire country, representing the special economic interests of different classes, of the banks, the merchants, the employers, the workmen, the farmers. If these powerful national organizations are to expand their claims for special favor in the community into a great conflict, then the whole fabric of our national life has gone by the board. If, on the other hand, there is developed a practical step in coöperation between these great groups, we will have laid the foundation of a new economic era, we will have solved our economic ills of the last century in the only fashion that democracy can solve its troubles, by the initiative of the individual and by the sense of service to the country as a whole.

What does this mean if it is not a recognition of a present anarchic domination of the occupations and a plea for order through their

union. And if this union of all the occupations, which in the end will mean an economic union of all of us, is once effected, it will, of course, be irresistible. Government as constituted will be an inanimate mechanism which the occupational groups may continue to use, though they will be the real government. In that event Congress may continue to be selected by a count of noses, geographically divided, but what it will do will be determined by business and not by politics. Laws will be for and of business, in the broadest sense, —agriculture, labor, manufacturers, the professions, commerce, transportation, mines,—and business, become the nation, will consciously direct its destinies.

Beard, (4th Ed.), pp. 242–283.
Kimball, *National Government,* pp. 308–356.
Ogg and Ray, (2nd Ed.), pp. 383–405.

IX

THE JUDICIARY

The Supreme Court of the United States has been subjected to searching scrutiny during the past twenty years, and presidential campaigns from 1912 to 1924 have brought to the fore a discussion of the powers exercised by this body. Two widely divergent views have been presented. One group holds that the Court has usurped the power of judicial review and should be curbed by one means or another. Some would increase to six or seven the number of judges necessary to declare laws unconstitutional, thereby eliminating the "five-to-four decisions"; others would give Congress the power to veto over the Court when national laws are declared unenforceable. A second group sees in the Court an almost "sacred" institution which has preserved the principles of American liberty and justice, and which has prevented the national government from usurping powers rightfully belonging to the states and to the people. The situation has been well discussed and the great majority have indicated approval of the existing situation. Despite criticisms, which in many cases may have been justifiable, the Court has maintained a high place in the mind of the citizen.

Discussion of the Supreme Court has dwarfed into insignificance the lower courts, the work of which has been doubled and trebled in the twentieth century by immigration laws, prohibition laws, trust legislation, and the like. An overburdened federal court system has failed to act with the promptness and the dispatch characteristic of earlier decades. As a result the law-breakers' fear of the federal courts has been largely dissipated. At the same time the work of Federal Commissioners, Federal District Attorneys, etc., has greatly increased, and these officers have been unable to keep pace with the requirements of their office.

The federal court system has had these two main criticisms, judicial review and failure to meet the demand of the times. The first has too many ramifications for any simple settlement, but the second may be solved by reorganization, an increased number of judges, and a more careful consideration of their activities.

37. SHALL WE REMAKE THE SUPREME COURT?[1]

I. THE ORIGIN OF ITS POWER

By Charles Warren

Recent decisions by the Supreme Court of the United States, holding that Congress has exceeded its authority in passing legislation not warranted by the Constitution, have revived the discussion as to the exercise by the courts of the power of judicial review.[2] It is urged by some that this power to pass upon the validity of acts of Congress, even assuming its legality, should be abolished or limited. By others the lawful existence of the power is absolutely denied; its exercise is said to be a "usurpation"; it is claimed that Congress is the final judge of its right to legislate on any subject; and it is pointed out (apparently under the mistaken notion that English practice would be applicable here) that in England and in most European countries the Parliament is the supreme judge of its own powers.

There is a very necessary reason, however, why in the United States Congress should not be its own final arbiter. Unlike England, the United States has a federal form of government, under which, in the same territory and over the same body of citizens, two distinct governments operate—the National and the State, each limited in its powers by the provisions of the Constitution. One of the most important class of questions which comes before the Supreme Court, therefore, is that in which the claim is advanced by one or the other of the parties to the suit that either Congress or the State legislature has exceeded these limited powers. No such question can come before an English court with respect to acts of Parliament, since no such class of limitations on the powers of Parliament exists.

If the United States possessed no Supreme Court, with authority to say when Congress or a State legislature had trespassed beyond the field assigned to them respectively by the Constitution, then both Congress and the State legislatures would have full power to legislate at their own sweet will, utterly unrestricted by the provisions of the Constitution. And, as a natural and inevitable consequence, Congress, being the mightier body, would prevail in every instance, and national legislation might sweep away all boundaries between the nation and the States in any case in which Congress felt

[1] Reprinted from *The Nation*, May 7, 1924, by permission of the publisher.
[2] Refers to Child Labor and Minimum Wage Cases.

sufficiently strongly the necessity or desirability of so doing. As to the citizens of the States, Congress might violate every one of the Bill of Rights, contained in the first ten amendments, and no citizen of a State would have any redress in court. Of the later amendments, each might be violated at will by Congress, if unrestricted by the judiciary; and Congress might, therefore, authorize the sale of intoxicating liquors, in complete violation of the Eighteenth Amendment, or it might directly legislate as to the rights of Negroes in the States, in violation of the Fourteenth Amendment.

In other words, instead of a federal government with limited powers, and with complete reservation to the States and their citizens of all other powers and rights, we should have a consolidated government with unlimited powers, and with no rights left to the States and their citizens except such as Congress, in its supreme autocracy, might see fit to leave or to grant to them. That this is no imaginary danger is shown by the fact that Congress has, in the past, enacted at least ten laws violating the Bill of Rights; and the citizens have been protected only because the court has held that the Constitution must prevail in their defense over such laws of Congress.

The voters of this country, if they so desire, have the right, of course, at any time to change the powers and functions of the branches of their government, provided they do it in the method required by the Constitution, i. e., by amendments duly adopted by the necessary votes of Congress and of the States. But when such a change is suggested as the destruction of the most important function of the Supreme Court the voters ought to be made to realize, in advance, that this change means the destruction of their federal form of government. Moreover, arguments in its favor should be based on facts, and not on mere declamation.

Unfortunately, the assault upon the Supreme Court's power of judicial review has heretofore been accompanied by either suppression or absolute misstatement of historical facts. For a number of years past a charge has been that the power of the Supreme Court to pass upon the validity of acts of Congress was a "usurped" power, first exercised by John Marshall, in Marbury *vs.* Madison, in 1803. The reiteration of this charge has gained it a certain degree of credit. Had either the opponents or the defenders of the court made a thorough examination of the newspapers, pamphlets, debates, and correspondence of the early years of the country they would have found that, far from being regarded as a "usurpation," the court's power of judicial review was acknowledged from the very outset by both political parties; and that when Marshall rendered his

famous decision in 1803 he only expressed a view which had been little challenged at all between the years 1789 and 1802.

In the first place, in the debates in the Federal Convention of 1787, this power of the federal judiciary was specifically recognized on several occasions, notably by Elbridge Gerry of Massachusetts and Luther Martin of Maryland (both of whom opposed the adoption of the Constitution, though on other grounds), by James Wilson and Gouverneur Morris of Pennsylvania, by James Madison and George Mason of Virginia, and by Hugh Williamson of North Carolina. Oliver Ellsworth of Connecticut, William R. Davie of North Carolina, John Blair, Edmund Randolph, and George Wythe of Virginia, Alexander Hamilton of New York, and David Brearly of New Jersey were also members of the convention who expressed themselves in 1787 and 1788 in favor of the power. Its existence was denied by only four members of the convention. Moreover, before the convention met, the legislatures of four States, North Carolina, Rhode Island, New Jersey, and New Hampshire, had passed statutes depriving citizens of the right of jury trial, and these statutes had been set aside by the State courts, in decisions each one of which was known to members of the convention; this example of the necessity of providing a judiciary to safeguard important constitutional rights must have impressed itself upon the members of the convention at the time. Senator La Follette is hardly justified, therefore, in saying that "It is absolutely certain the Constitution would never have been adopted had the men at that time believed that the court they were providing for would assume the powers now exercised by our federal judges."

Before the Constitution was adopted those who opposed it used the existence of the Supreme Court's power of judicial review as an argument against adoption, but they did not challenge the fact of its existence. Thus a prominent writer in the *Independent Gazetteer* in Philadelphia said February 23, 1788: "Besides, should Congress be disposed to violate the fundamental articles of the Constitution . . . still it would be of no avail as there is a further barrier interposed . . . namely, the Supreme Court of the Union, whose province it would be to determine the constitutionality of any law that may be controverted. . . . It would be their sworn duty to refuse their sanction to laws made in the face and contrary to the letter of the Constitution." As soon as the new Government was started a New York correspondent of the London *Public Advertiser*, October 19, 1789, wrote specifically that the court was to exercise a right of judicial review of acts of Congress as follows: "The

judicial power is established for the benefit of foreigners, and will be a check on any encroachment by the State or the United States on the Constitution. They have the power of declaring void any law infringing it."

Senator Ladd of North Dakota has recently written: "One thing is certain, and that is that the Congress which enacted the Judiciary Act of 1789 never dreamed that it would be at any time so construed as to be the instrument of judicial usurpation." This is an illustration of loose statements made without any examination of the historical facts. For the very Congress to which the Senator refers, the First Congress, at its first session, is on record as not only recognizing by welcoming the court's power of judicial review—not as a "usurpation" but as an existing and desirable function. In June, 1789, a bill was discussed in the House making the Secretary of Foreign Affairs removable by the President. Objection being raised to the constitutionality of this measure, it was emphatically contended by congressmen from the Southern States and by Anti-Federalists that Congress ought not to legislate, since the question of the President's power to remove was one which must be settled by the judiciary. Abraham Baldwin of Georgia said: "It is their province to decide upon our laws, and if they find them to be unconstitutional, they will not hesitate to declare it so." John Page of Virginia said that the Constitution ought to be left "to the proper expositors of it" —the judges. William Smith of South Carolina stated that the question of the President's right of removal should be "left to the decision of the judiciary." Alexander White of Virginia said: "I would rather the judiciary should decide the point because it is more properly within their department"; and again: "I imagine the legislature may construe the Constitution with respect to the powers annexed to their department, but subject to the decision of the judges." It remained, however, for Elbridge Gerry, one of the strongest of the Anti-Federalists, to assert most clearly that "The Judges are the constitutional umpire on such questions. . . . We are not the expositors of the Constitution. The judges are the expositors of the Constitution and acts of Congress. Our exposition, therefore, would be subject to their revisal. The judiciary may disagree with us and undo what all our efforts have labored to accomplish."

Two years later, in February, 1791, in the same Congress, there occurred in the House a heated debate on the right of Congress to charter a corporation, the first bank of the United States. This right was not given to Congress in specific language by the Constitution; and its existence was violently denied by the Anti-Federalists, by Madison and Jefferson, and by those who later be-

came the Democratic party. It was earnestly upheld by the Federalists. The Anti-Federalists in Congress argued against the passage of the bill on the ground that, even if passed, the Supreme Court would be bound, and ought, to hold it unconstitutional. The Federalists cited the possession of such a power by the court as an argument in favor of the passage of the bill, for, they said, if Congress errs in so passing it, the court will correct the error. "The last objection is that, adopting the bill, we expose the measure to be considered and defeated by the judiciary of the United States, who may adjudge it to be contrary to the Constitution and therefore void," said Elias Boudinot. "This gives me no uneasiness. I am so far from contravening this right in the judiciary that it is my boast and my confidence. . . . It is the glory of the Constitution that there is a remedy even for the failures of the supreme legislature thereof."

Thus, in these early congresses, both parties upheld the court's power of judicial review; there was no talk of "usurpation," but rather a demand that the court should exercise an acknowledged power.

One year later, another act of Congress and the question of its power to pass it actually came before the judges of the court in the famous Hayburn Case, in April, 1792. The case involved a subject on which the American public was considerably wrought up—the pensioning of its much-neglected invalid veterans—a subject which is by no means unfamiliar today. Congress had passed a statute imposing on the justices of the Supreme Court the duty of examining and passing on these pensioners' claims with a final right of review by the Secretary of War. A refusal to assume the duties thus imposed by Congress was likely to bring odium on the judges and to alienate popular sympathy. Nevertheless, the Supreme Court justices, sitting in the United States Circuit Court in Pennsylvania, unhesitatingly proceeded to hold the act of Congress unconstitutional, on the ground that the duties directed to be performed were not of a judicial nature. Here was a subject and an occasion when, if ever, we should expect to find charges of judicial usurpation, and especially from the Anti-Federalists, who were particularly opposed to all extensions of Federal power. But on an examination of the newspapers of the time, the curious fact appears that it was the Anti-Federalist press which especially supported this exercise of judicial power. Thus, the violent opponent of federalism and supporter of Thomas Jefferson, Freneau's *National Gazette,* not only applauded the decision but expressed the hope that the court might hold other federal legislation unconstitutional. It stated that the judges' action

"must be matter of high gratification to every friend of liberty, since it assures the people of ample protection to their constitutional rights and privileges against any attempt of legislative or executive oppression." The Anti-Federalists evidently regarded the court as a great source of protection to the people against encroachments of power by Congress. It was the Congress whose usurpation they feared, not the court. The Federalists had always upheld the court. Here again, as early as 1792, was an instance of support of the court's action by both parties.

In 1796 the validity of the federal carriage tax was argued before the court and upheld by it; but the Anti-Federalists, particularly in the South, not only did not deny the court's power to hold the tax unconstitutional but were exceedingly anxious that it should so hold. So in 1799 and 1800 the Anti-Federalists were insistent that the court should hold the Alien and Sedition laws unconstitutional, and bitterly attacked the judges for failing to so hold.

Conclusive disproof of the charge of usurpation may be found also on an examination of the current literature of the years from 1789 to 1802. Had there been any great popular discontent at the exercise of power by the judiciary, it would have revealed itself in letters or editorials in prominent Anti-Federalist papers like the *Aurora* in Philadelphia, the *American Citizen* in New York, the *Virginia Argus* in Richmond, or the *Independent Chronicle* in Boston, for the columns of these papers teemed with attacks upon every other alleged "outrage" or "usurpation" committed by Federalist officials and by Federalist judges. Yet these newspapers, and similar partisan journals of less wide circulation, contain (with the exception of letters from Charles Pinckney of South Carolina) practically no evidence of any challenge of judicial power between the years 1789 and 1802.

It was not until the latter year, 1802, in the midst of a bitter political fight over the federalist change of the judiciary system, enacted in the closing days of President Adams's Administration, that the power of the courts to hold acts of Congress invalid was for the first time challenged by senators and congressmen from Virginia, Kentucky, and North Carolina, but from those States alone.

It was just one year after this debate that Marshall rendered his decision in the famous case of Marbury vs. Madison, holding a section of the Judiciary Act unconstitutional—the action which has, in the last few years, been termed a "usurpation." Widespread newspaper publicity was given to this decision in 1803. It was printed in full in many papers; and a résumé of the opinion, published in Washington in Jefferson's administration organ, the *National Intelligen-*

cer, was copied into all papers of any consequence. An extensive examination of the papers opposed to Marshall in politics reveals practically no criticism of the exercise of the power of the court to set aside an act of Congress. Jefferson himself did not then attack the decision on this ground, but assailed it because of Marshall's attempt to interfere with the President's executive authority by even considering the question of issuing a mandamus to a cabinet officer.

It was not until a desire to get rid of the federalist judges by impeachment took hold of the Anti-Federalist politicians, in 1804, that talk of judicial usurpation became at all rife; and then it was based on politics and not on legal discussion or historical facts.

Opponents of the court now make much use of certain letters of Thomas Jefferson in which he attacked the court as being the "subtle sappers and miners constantly working underground to undermine the foundation of our confederated fabric"; "the inroads daily making by the federal court"; "that body ever acting with the noiseless foot and unalarming advance." But in these letters (written from 1819 to 1823, when he was an old man of eighty) Jefferson was not referring at all to the court's action in holding acts of Congress invalid; on the contrary, he was referring to the wide scope of power which the court was giving to Congress by upholding acts of Congress as against the sovereignty of the States. He was complaining because the court *failed* to deny the power of Congress. This fact is carefully concealed by the court's assailants in quoting these letters. So far from denying the court's power, Jefferson was exceedingly anxious that the Alien and Sedition laws, the act of Congress chartering the Bank of the United States, and the twenty-fifth section of the Judiciary Act, authorizing writs of error to State courts, should all be held unconstitutional by the court.

It is impossible, therefore, to regard as a usurpation by John Marshall the exercise of a function which was recognized and supported by both the political parties of his own time.

The fact is that it was not encroachments by the court on Congress which alarmed Jefferson and his adherents from 1801 to 1823, or the Democrats of the 1830's and 1840's; it was encroachments by Congress on the sovereignty of the States, *upheld* by decisions of the court, which they feared. Then when the year 1850 arrived, and the passage of the Fugitive Slave law, there immediately arose the most violent attack on the court in all our history—but this time made by the Republicans and Abolitionists—an attack which continued for ten years, not because the court denied the constitutionality of that act but because it refused to do so.

With the charge of "usurpation" thus cleared away the question as

to the possession of the power of judicial review by the court may be considered simply on its merits, i. e., from the point of view of the necessity and desirability of its exercise.

It is true that the Constitution does not expressly vest this power in the court; but it is also true that it vests no other powers in the court. While the Constitution vests in a Congress "all legislative powers *hereby granted,*" thereby specifically defining and restricting the power of Congress, it vests "the judicial power" in a Supreme Court and inferior courts, without any definition or restriction of the court's powers at all, and simply states to what class of cases their jurisdiction shall extend. In other words, while Congress has only limited powers, the Supreme Court has all powers which are inherently necessary to enable the court to function, as a court, in a federal form of government with a written constitution. It impliedly possesses, therefore, the power of judicial review, just as the President impliedly possesses power of removal of officers—a power not expressly granted by the Constitution, but inherent in the term "the executive power," which the Constitution vests in "a President." As John Marshall said in 1803:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if the law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformable to the law, disregarding the Constitution; or conformable to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

As to the desirability of the court's function, that will depend upon whether the citizens of this country wish to retain the federal form of government, under which they have existed for 134 years, or whether they wish to live under a consolidated and autocratic government by Congress, with States and citizens possessing no right or power save such as Congress sees fit to leave to them. To abolish the court's power of judicial review means to destroy the former form of government and to institute the latter.

Finally, we should never lose sight of one fact, which is often obscured, owing to the loose use of language too often indulged by courts and lawyers as well as by laymen. The court does not "veto" an act of Congress; it does not in reality hold it void. The decision rendered by the court in a case involving a federal statute is not

a mere decision that the statute is valid or invalid; it is a determination of the rights of two parties actually litigating before it, the one claiming a personal or property right based on the law as found in the statute, the other claiming his right under the law of the Constitution. The court, in deciding which of these two parties shall prevail, must of necessity hold that the superior law fixes the rights of the parties, and that the other law, if conflicting, must be disregarded.

To those who urge that the court should be prevented from thus deciding the rights of parties litigating before the court, the question has been very strikingly put by a president of the American Bar Association, John W. Davis:

> Shall we say that when an American stands before the court demanding rights given him by the supreme law of the land the court shall be deaf to his appeal? Shall wrongs visited upon him by the illegal excesses of congresses or legislatures be less open to redress than those which he may suffer from courts, or sheriffs, or military tyrants, or civilian enemies? If this be so, if in any such case the ears of the court are to be closed against him, it is not the power of the court that has been reduced but the dearly bought right of the citizen that is taken away.

38. SHALL WE REMAKE THE SUPREME COURT?[1]

II. THE PRACTICE OF OTHER COUNTRIES

By Charles Grove Haines

It is difficult to compare the American practice of judicial review with similar features of other governments, for comparisons prove misleading in dealing with the rather unusual powers of courts to declare legislative enactments void. Differences in the evolution of government and of legal traditions render this practice markedly different when adopted under circumstances varying greatly from the conditions prevailing in America.

Among the features that modify provisions for judicial review of legislation, the first is the fact that under continental European systems of government, or those whose legal foundations have largely been based upon the influence and traditions of the Roman law, governmental authority emanates from and is guided largely by the execu-

[1]Reprinted from *The Nation*, May 14, 1924, by permission of the publisher.

tive and not by the legislature as in Anglo-American countries. Certain conditions naturally result from this fact, namely, the establishment of separate courts or councils to deal with controversies between individuals and public officers; the courts as a rule are not permitted or in practice do not follow strictly earlier precedents or decisions; the natural deference to the executive officers and a traditional noncontentious habit of mind resulting therefrom lead to the acceptance of the authority of administrative officers rather than to a frequent contesting of their authority; and, finally, provision is made for a "state of siege" to be declared by the executive at his discretion, or sometimes subject to the consent of a committee of Congress, when individual rights and guaranties may be completely subordinated to the executive power. Under the "state of siege" the civil authority is taken over by the army, military tribunals try offenses against public peace and order, homes can be searched, arms can be taken over from the citizen, and public meetings can be prevented. The frequency of the establishment of this condition, particularly in Latin-American countries, militates strongly against well-defined checks upon executive or administrative powers. Martial law in Anglo-American countries, which is the only thing comparable to the "state of siege," is seldom resorted to and is commonly held in strict subjection to the civil authorities unless public necessity requires military action.

Again, judicial review of legislation can have relatively slight influence in countries where constitutions are frequently revised and are readily amendable. There has been a progressive tendency to make the amendment of constitutions easy and to revise them completely at frequent intervals. Such a condition leaves little room for judicial review of legislation to develop.

Finally, where countries adopt written constitutions, and either do not insert extensive bills of individual rights or guaranties or do not include general phrases such as due process of law or the equal protection of the laws, by which legislation is to be tested, judicial review again has little opportunity for growth. There is no basis for the courts to construe implied limitations on legislative and executive powers. Making due allowance for these differences the governments of the world may, with respect to judicial review of legislation, be roughly grouped into the following classes:

1. Governments in which the legislature interprets finally the fundamental law. Examples: England, with an unwritten constitution; Chile, France, Italy, and Switzerland, with written constitutions.

2. Governments in which the authority to interpret finally provisions of the constitution, and as a consequence to invalidate acts in

conflict therewith, is implied as a necessary requirement to maintain the equilibrium between federal and state governments. Examples: United States, Australia, Canada, Brazil, and Argentina.

3. Governments in which the constitution grants authority to the courts to interpret the constitution and to prevent violations of its provisions. Examples: Colombia, Czecho-Slovakia, Honduras, Irish Free State, Portugal.

4. Governments in which the power is considered as belonging to the courts to review the acts of coördinate departments but in which the power has been exercised so infrequently as to have little significance. Examples: Greece, Norway, and South Africa prior to 1910.

In group one the English system of guaranteeing individual rights is unique. After the great charters of liberty such as Magna Charta, the Bill of Rights, and the Petition of Rights were issued in England and served to check the royal powers and prerogatives, a revolution occurred by which parliament became supreme and the king subordinate. After this change Coke's theory, proposed in the great conflict with James I, that reason and the common law as interpreted by the courts must be looked upon as superior to both the king and parliament, was discarded and by a gradual process parliamentary supremacy was established. Practically, then, since the beginning of the eighteenth century, the executive and legislative departments in England, under the designation King, Lords, and Commons, combine to legislate and to administer the laws. The judiciary and all other public authorities are bound to obey the mandates of parliament as the highest power of the state. In the words of an eminent jurist: "The corrective of the action of parliament as a human and fallible institution is not a legal corrective, lies not with the judiciary, but lies with parliament itself, acted upon by a fresh wave of public opinion, a higher sense of duty, a wider range of experience, or a broader perspective in the range of applied justice."

Parliamentary supremacy in England is modified to a considerable extent by what is known as the "rule of law." All officers are held strictly within the law as laid down by parliament, and the courts of England exercise an extensive review of the acts of public functionaries to see that they keep within the powers granted by law. Under this rule English courts recently held that not even the King in Council by executive order could take the property of a citizen during war time for military purposes without awarding just compensation for losses incurred. This practice of the courts, however, stops short whenever parliament expresses a clear and unequivocal mandate. For example, the courts of England decided that labor unions were corporations in the sense that they might be sued before

the English courts. After an active campaign before the people and in parliament, an act was passed in effect reversing this decision; the courts thereafter were bound to follow and accept the act of parliament. But England has no written constitution, and it is generally believed that parliamentary supremacy is a natural result where no definite fundamental law has been formulated.

Chile, having modeled her government in certain respects after the English system, especially provides in the constitution that congress shall settle all questions as to the interpretation of the constitution.

A different plan of securing individual guaranties was developed in France, where a form of government and of legal principles was adopted, based, in large part, upon Roman principles and practices. Though a declaration of rights was framed in 1789, including most of the individual guaranties of the English charters, the method of securing these individual rights was placed on an altogether different basis. The same theory of separation of powers which was thought in America to require judicial review of legislative acts to preserve written constitutions and to protect individual rights was interpreted in France to forbid the judges from interfering in the exercise of legislative power and of preventing them from suspending the execution of laws. Owing to the resistance of the courts to executive orders and decrees prior to 1789, it was made an offense for a judge to interfere in the affairs of public administration. The result of these provisions and their interpretation is that France and certain other governments which are based to a large extent upon the French system of law expressly prohibit the courts from refusing to execute laws duly made and promulgated. Though there are today many Frenchmen who favor some form of judicial review of legislative acts, in practice, the parliament of France is regarded as supreme. Most Frenchmen who favor the adoption of the principle of judicial review of legislation emphatically declare that they do not wish to adopt the American theory of the separation of powers, the American doctrine of affording protection of vested rights, the broad rule of reason as a requirement for legislative acts under the due-process clause, and other implied limitations which American judges have interpreted as restrictions upon the exercise of legislative powers.

This does not mean that private rights are without protection in France. The courts, as in England, enforcing the rules of law, exercise an extensive review of the actions of public officers in that they possess the authority of holding executive ordinances illegal and of annulling administrative acts either for an excess or misuse of power.

France, unlike England, has a written constitution. This constitution, which provides for only a part of the actual framework of government and includes nothing as to the protection of the rights and liberties of the individual, has seldom been amended since its enactment in 1875. France looks upon her constitution as a rigid document, whereas the Constitution of the United States is thought to be quite flexible. France is one of the chief examples of a government with a written constitution and legislative supremacy; that is, where the protection and guaranties of the constitution rest with the legislature itself, guided and tempered by public opinion as the source of legislative power and authority.

Austria, Germany, Italy, and Poland have followed France in denying to the courts the power to examine into the validity of laws. To this list could be added many other countries with written constitutions, such as Japan, Spain, and Sweden, in which it is taken for granted that the normal functions of courts do not include the power of examining into the validity of legislative acts. So common is the impression that unless such power is expressly granted to the courts, or is regarded as necessary to adjust federal relations, it is assumed that the functions of the courts are confined to the interpretation and application of the laws, and this does not include an examination of their validity.

A modification of the English and French systems was adopted in Switzerland, where since the Middle Ages some form of federal government has prevailed. In Switzerland the legislature has been regarded as supreme, and has in its power the final interpretation of the constitution. But in order to render a federal system effective and to adjust the relations between the nation and the cantons, the courts were given the authority to review the acts of the cantonal legislatures. The guaranty, then, of individual rights in Switzerland, as in France, rests with the legislative bodies as influenced and guided by the public sentiment of the nation. The legislature of Switzerland is the final interpreter of the constitution, subject only to a referendum by which such a decision may be changed. It is worthy of note that Switzerland with a federal form of government and a written constitution deliberately rejected the main feature of the American plan of judicial review after a careful study and report on the plan by a group of experts. Switzerland, having in large part adopted the French administrative system, provides for the protection of private rights and individual guaranties on a basis similar to that of France.

The federal systems of Canada and Australia, among the governments in group two, carry the principle of judicial review of legislation one step farther than is done in Switzerland. The courts of

these countries are regarded as having the right to review all legislative acts both of the state and of the central government in order to maintain the balance of powers as defined in the constitution. There is also in both of these countries judicial review of the acts of the provinces or of the states to see that these subordinate bodies do not overstep their jurisdiction; but judicial review of legislation in such countries as Canada and Australia has a narrow and limited application, for their constitutions contain few, if any, provisions guaranteeing individual rights and no general phrases such as due process of law, equal protection of the laws, or other language from which extensive implied limitations may be interpreted.

Citizens of Canada also take pride in the fact that their courts do not meddle with matters of economic or social policy, as did the Supreme Court of the United States in the Lochner or New York Bake-Shop case, the Child Labor case, or the Minimum Wage case. Having no special provisions in the constitution for the protection of acquired or vested rights, corporations or citizens cannot appeal to the Canadian courts for the protection of such rights unless a branch of the government attempts to assert authority entirely beyond the scope of its jurisdiction. Rate-making, the control of public-service corporations, and most other economic or social affairs are regulated by Canadian legislatures or commissions established by these bodies, which act subject only to review by the legislative bodies themselves or an ultimate appeal to the electorate.

Certain South American countries such as Brazil and Argentina not only provide for the review by the courts of acts of the states which may be in conflict with national powers but also have accepted the American practice of declaring void the acts of coördinate branches of the government. The Brazilian courts, following the general purpose to adopt the American system as defined by Chief Justice Marshall, do not hesitate to declare void acts of the national congress. Eight acts have been held invalid since 1915. Though similar authority is exercised by the courts of Argentina, the power is used less frequently and, as compared with either Brazil or the United States, such decisions are exceptional. Similarly the provincial or state courts of Argentina have shown great reluctance in declaring acts invalid. This reluctance is thought to be due to the fact that the citizen, following Spanish traditions, prefers to abide by the law rather than to test its constitutionality. Another reason is thought to inhere in the greater authority accorded to and confidence in executive agencies which is characteristic of most Latin-American countries. The rather common practice in Brazil and Argentina of instituting by executive order the "state of siege," previously referred

to, interfere with the development of traditions favorable to the establishment of effective individual guaranties. Moreover, the fact that the courts in South American countries follow the French practice of according comparatively little weight to precedents renders the basis for judicial review insecure and vacillating.

A somewhat limited form of judicial review of legislation has been devised in the writ of *amparo* used in the neighboring republic of Mexico. The original purpose of the writ of *amparo* was designed so that the federal courts should aid every citizen in the preservation of the rights conceded by the constitution. In practice the application of the writ has been narrowed to the twenty-nine enumerated guaranties in the constitution, and laws will not be declared void unless one of these guaranties has been violated. The authority may not be used to pass on conflicts of jurisdiction, and suit can be brought only in an original action before the Supreme Court. Barring the difficulties which have militated against orderly judicial procedure in the determination of private rights in Mexico, it is obvious that legislative acts can seldom be held void under such a limited judicial review.

Among the governments in group three, in which the constitution grants authority to interpret the constitution and to declare acts in conflict therewith void, the courts in Colombia and Haiti seem to exercise the power so rarely as to have little effect on the course of public affairs. In other countries, such as Costa Rica, Cuba, Honduras, Nicaragua, and Venezuela, where Spanish-American traditions prevail, the exercise of such powers by courts cannot have results in any way comparable with judicial review in the United States. Czecho-Slovakia and Ireland have adopted the plan too recently to determine what form of judicial review may be adopted.

In comparing judicial review of legislation in the United States with this practice in other countries it should be noted that it is customary in almost all countries for the courts to exercise a limited control over the acts of corporations and subordinate units such as municipalities and similar public organizations. This control is usually referred to as declaring acts *ultra vires,* meaning that the acts of these subordinate corporations or public governmental bodies are void if they attempt to exercise powers beyond those which are expressly or by necessary implication granted to them. Furthermore, it is not uncommon for the courts to require that the acts of these subordinate bodies must be reasonable and to hold certain acts invalid if regarded as unfair or unreasonable.

Misunderstandings have resulted also from the failure to distinguish between review of legislation and judicial review of ordi-

nances and of the acts of administrative and executive officers, which is common practice throughout the world. An extensive review of this character is exercised by the English courts under what is known as the "rule of law," to which reference has previously been made, and by review in France and other countries with similar political systems of all acts of executive and administrative officers.

Another basis for misunderstanding has arisen over the failure to distinguish between review over a central government from that over subordinate divisions such as states and provinces in federal systems of government. Where a federal government is established some agency must delimit the powers between the central and local governments. It has been quite common to place this delimitation of powers upon the courts, and in a number of federal systems the judiciary tests the validity of laws of the states or provinces to discover whether they are in accord with the fundamental written law. This is the practice in Switzerland, where the courts exercise such powers but are denied the greater authority of passing on the acts of coördinate bodies. Judicial review of subordinate divisions is established in Australia, in Canada, and in the new German constitution, and comprises the most important part of judicial review in these countries. A similar review has been established in the federal systems of Brazil and Argentina. This type of judicial review needs to be distinguished very carefully from the attempt of the courts to pass on the acts of coördinate legislative bodies. It is in the latter field where the courts exercise their most important function in the review of legislation in the United States.

In the government of the United States the courts exercise, first, an extensive surveillance over the acts of subordinate units of government, such as cities and counties, both to keep local authorities within their jurisdictions and to test their acts as to fairness and reasonableness; second, all acts, orders, or rules of administrative and executive officers are subject to review by courts to see that they keep within the law and that their powers are not abused to the detriment of the lives, liberties, and property of individual citizens; third, another phase of judicial review in the United States inheres in the control exercised by the courts over acts of the States which are regarded as in conflict with the federal Constitution, treaties, laws, and regulations (this authority is exercised frequently both by State and federal courts); fourth, by far the most important part of judicial review in this country is the practice of courts, federal and State, of declaring void the acts of coördinate departments, such as the Supreme Court in invalidating acts of Congress, and the State supreme courts in invalidating acts of the State legislatures.

Of even greater significance than the adoption of all four of the above phases of judicial review in the United States is the fact that much the larger part of the powers now exercised by the courts in reviewing legislation has resulted from the application to executive and legislative acts of judge-made concepts and restrictions. A considerable part of these restrictions has grown up in connection with the doctrines of vested rights and of implied limitations on legislative powers conceived as inherent in the American concept of free government. Free government, as understood elsewhere in the world, seldom requires the application of such judicial checks. But in the United States public sentiment in the main has approved the process of developing limits to legislative powers both by express provisions of written constitutions and by judge-made implied limitations.

It is in the exercise of this extraordinary power, not generally recognized as belonging to the functions of courts and not expressly provided in American written constitutions, that more than fifty acts of Congress have been nullified and from 1,500 to 2,000 acts of the States. It is the combination in this country of all four of these phases of judicial review, and of numerous additional express and implied restrictions on legislative and executive acts, which has given currency to the term "judicial supremacy," or as French commentators put it "government by judges," and that warrants the assertion that the United States is the prime example today in which a theoretically democratic political order is tempered and confined by a series of checks administered by an "aristocracy of the robe."

39. ECONOMIC INTERPRETATION OF JUDGES[1]

By Zechariah Chaffee, Jr.

Ten years ago political discussion was focussed on the problem,—what is the proper task of judges in carrying on the work of a modern democracy? Those of us who think that the advocates of the recall of judges and of decisions were on the wrong scent must at least admit that they illustrated the proposition of John Stuart Mill, that the free expression of error is valuable because it puts truth on its mettle and forces it to justify itself to the public by strong arguments instead of resting content with antique and flabby reasoning. The controversy over the origin and merits of judicial review of legislation bade fair to produce a thorough reexamination from a

[1] Reprinted from the *New Republic,* June 7, 1922, by permission of the author and publisher.

twentieth century point of view of the question, what does a judge do, what ought he to do, how shall he be chosen, how long shall he be left undisturbed in his office? There was a popular overhauling of these questions in speeches, newspaper editorials, and ten-cent magazines, and the publication of scholarly investigations by Beard, Corwin, and McLaughlin. But before the problem of the judicial function was completely solved, the outbreak of the European war and the collapse of progressivism caused its importance to be forgotten.

New life has now been given to these issues by the publication of Senator Beveridge's widely-read biography of our greatest judge. Study of the part which Marshall played in American economic and political development inevitably throws light on the work of judges in general. Moreover, those who regard a judge as really a political official, who consequently ought to be elected, controlled, and removed by the people at large, point to Beveridge's frequent praise, not so much of Marshall's legal ability, as of his statesmanship. It is repeatedly stated that he deliberately made use of small cases to establish his own views of what was good for the nation. We are told that the dispute in Marbury vs. Madison had become "of no consequence whatever to any one" as a concrete matter, when Marshall used it to establish the power to declare acts of Congress unconstitutional, a step "which for courage, statesmanlike foresight, and, indeed, for perfectly calculated audacity, has few parallels in judicial history"; that his decisions on international law illustrate, not only his legal knowledge but "his broad conceptions of some of the fundamentals of American statesmanship in foreign affairs"; that in McCulloch vs. Maryland he rebuked disunionists and the Virginia Republican machine. Beveridge describes Fletcher vs. Peck as a trumped-up case, which a weaker man would have refused to decide, but thinks it one of the firmest proofs of Marshall's greatness that he considered it necessary for the nation's highest court to lay down plainly the law of public contract. Still more startling is Beveridge's opinion that Johnson, a Republican Justice, would have differed outright from Marshall in this case, had not the disposition that Marshall made of it been ardently desired by the Republican leaders, Jefferson and Madison.[2]

Even if we regard with considerable doubt this presentation of judges as using controversies before them to carry out definite party policies, we must reckon with the sober judgment of Corwin, that Marshall refused "to regard his office merely as a judicial tribunal; it was a platform from which to promulgate sound constitutional prin-

[2] Beveridge, III, 125, 132, 593; IV, 121, 304.

ciples." [3] Is the Chief Justice of the United States not merely the arbiter of disputes according to settled law, but in fact a statesman, creating national policies? If so, should not he be responsive to the popular will like the Lord Chancellor of England? And the same question exists, with slightly less importance, with respect to all other judges, federal and state.

Certainly, the views just quoted from Beveridge and Corwin are far from the orthodox theory of the judge's part in the development of law, that he applies already existing rules to the facts before him, or if a new rule is necessary he evolves it from existing rules by the application of rigid logic. This theory makes his operations as impersonal as those of an adding machine. The facts press the buttons, the cogs revolve, out comes the answer. Only one right answer is possible, but if the judge's mind is of an inferior make, a cog occasionally slips and the wrong result gets printed. However, the quality of the additions is not affected by the fact that the machine has been set in the city or the country, among rich or poor, scholars or men of action. Advocates of this theory resent even the suggestion that Marshall's decisions were influenced by his early contact with Washington and his experience of state incompetency in and after the Revolution.

At the opposite pole is the theory of Gustavus Myers' History of the Supreme Court, that a judge is a loaded roulette-wheel, which always makes the banker come out ahead. He describes Marshall and his associates on the bench as engaged in a ceaseless practice of "You scratch my back and I'll scratch yours," each justice virtuously abstaining from participation in the decision of cases affecting his own pocket-book in the confident expectation that the rest of the Court would stand by him in return for similar favors when their cases came up. The holocaust of corruption which he paints makes one suspect that Mr. Myers got his two books mixed up, and carried over into the Supreme Court too many impressions gathered in his researches into the history of Tammany Hall.

Others (and in part this is Mr. Myers' view) without charging a judge with corruption, lay great emphasis on his unconscious class bias as the main explanation of his legal doctrines. It is evident that as soon as we reject the adding-machine theory and admit that those doctrines depend on something besides strict logic, the question what the additional factors are becomes very important. If a judge is only a political official, statesman perhaps, who makes deliberate choice of policies, the way is readily open for supporters of the economic interpretation of history to insist that his choices are largely

[3] Corwin, *John Marshall and the Constitution,* page 122.

attributable to financial motives and class attitude. Thus the reviewer of Beveridge in the New Republic [4] thinks that "perhaps the decisive influence" in determining Marshall's mind toward nationalism was "his own economic interests," and that the fact that the Constitution of 1787 was calculated to protect Marshall's ownership of one thousand acres of land in Fauquier county under the Fairfax title, because it would prevent Virginia from disregarding treaty rights, "no doubt was influential in inclining Marshall to support" that Constitution in the Virginia Convention of 1788.

In view of the low value of frontier land and the number of forcible arguments of public advantage stated by Marshall to support his vote, it seems rash to assume that because his private profit might have swayed his opinion on a matter which obviously affected thousands of persons on whose behalf he knew he was deliberating, therefore it did sway him. As well assume that a man's insistence that exemption from Panama tolls for American shipping is a breach of a treaty, arises from his ownership of a few transcontinental railway shares, which may suffer from marine competition. That the desire to obtain necessities and luxuries for one's self and family, and the craving for the power which comes with wealth, are elements in the formation of character and opinions is conceded. Furthermore, the accumulation of a large number of instances where differences of political views coincide with differences in economic status, as Beard proposes in his *Economic Interpretation of the American Constitution,* may show that economic motives must have guided the action of enough unspecified men in a mass to decide the action of the mass. It is a very different matter to pick out a particular man in that mass and feel sure that economic motives explain his action. In the same way, life insurance tables show how long the average man of thirty may expect to live, but not the actual longevity of Mr. Richard Roe, aged thirty.

The statement that the decisive influence upon the legal principles of any judge is economic is a generalization which, to be sound, requires first, the elimination of his logical powers of reasoning and of negative data which indicate the presence of non-economic motives of greater strength than the economic motives; and secondly, the careful verification of affirmative data which indicate the operation of economic motives. For instance, in Marshall's case the reviewer already quoted says, "As a practicing attorney in Richmond his largest fees are coming from the members of those very commercial classes who, with the land speculators, were most influential in the

[4] Review by B. B. Kendrick, April 6, 1921; correspondence between Mr. Kendrick and Charles H. Burr, May 4, 1921.

support of the new government." Is it so certain that his clients were mainly of this type? This could be tested by an examination of all Marshall's cases in the Virginia Court of Appeals (listed at the close of Beveridge, Vol. II). An inquiry into ten cases argued in 1793 and ten in 1797 [5] shows four cases of family disputes over the division of a decedent's property, one case on behalf of a sheriff, one defence of a prosecution for assault and battery. No class conflict here! Two land-title disputes turn on technical points of law. Four cases on behalf of creditors look more promising for the economic interpretation; but one is against the grantee of a fraudulent conveyance, another to collect a debt from an English tobacco-buyer, another by a son-in-law against his father-in-law for a marriage portion, and the fourth to foreclose a mortgage on slaves. And in eight cases, Marshall's clients were debtors, the very class which suffered from the Constitution as interpreted by him. The only client from "the commercial classes" is the tobacco-seller! Although a complete investigation of all the cases appealed—and his poorer clients would be less likely to appeal—may not conform to these twenty, it may be surmised and is indicated by Beveridge's anecdotes, that Marshall's clients were well-scattered through the social scale, and at any rate that he had no chance to become biassed from constantly representing the rich against the poor.

The trouble with the economic interpretation of the conduct of an individual is that it is a vaticinium post eventum, which knowing the result is able to seize upon the particular economic factors which seem to justify that result. If the result had been exactly the opposite, very likely other economic factors could have been found to justify that. For instance, suppose the general attitudes of Marshall and Jefferson had been reversed. Whatever the influence of a thousand frontier acres on Marshall, what more natural than that Jefferson who inherited 6,900 acres nearer civilization and bought 3,000 more should be a conservative, that as an eldest son he should oppose the abolition of primogeniture whereas he actually secured it, that the founder of the University of Virginia should applaud the Dartmouth College case which safe-guarded the wishes of donors, that the widely-travelled internationalist should despise state lines? And John Marshall, born poor on a farm where thorns were used for buttons, married on small earnings, who spent years in paying off indebtedness to British creditors, who had frequent cases against wealthy men, so that their iniquities may have become clear to him, who had many debtors as his clients, who saw Europe under conditions which gave him good cause to hate all foreigners, who never

[5] The first ten in I Call Reports, and in I Washington Reports.

went North after his military campaigns, how plain indeed the reasons why he became the champion of Southern localism, the narrow interpreter of treaty obligations, and the partisan of agrarian debtors against urban and European capitalists!

All these explanations of the judicial task are too simple. A judge is not a calculating machine, but a human being, subject to the subtle influence of heredity and environment, especially the surroundings and mental training of his first twenty-five years. And he cannot get outside of himself to do his thinking. His product is, therefore, bound to be affected by these influences. All the more need to recognize this frankly, so that he may lessen the risk of unjust decisions by allowing for the effect of large means or other personal factors upon his reasoning processes and thereby reduce their operation to a minimum, just as the astronomer learns to estimate the habitual lapse of time between the appearance of a star and his visual reaction to its light, and corrects his observations accordingly.

On the other hand, even if we reject the adding-machine theory and conclude that a judge's political or economic views play some part in the making of law, this does not mean that he should be selected on the basis of those views, as if he made law like a legislator or carried out policies like a Cabinet officer. The legislator initiates measures or votes on them solely according to his own views of policy or those of his supporters. The judge must wait until a controversy comes before him, and then must decide it, not by unrestricted consideration of policy or according to party welfare, but by rules of law. It is true that he sometimes has to work out new rules, and that even in the application of statutes his decision as to what they mean adds something to them which in a sense was not there before, but in all this his scope is limited by the pre-existing law. No one has stated this better than the judge who has been most quick to recognize social and economic aspects in law, Justice Holmes:

> We do not forget the continuous process of developing the law that goes on through the courts, in the form of deduction, or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight into the present wants of society. But the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change but to work out the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistency as he may be able to attain.[6]

[6] Stack *vs.* R. R., 177 Mass. 158.

This being so, the most important factor determining the quality of a judge's output is not his economic or social doctrine, but his legal power. By this I do not mean his knowledge of law conceived as a body of static rules, the way a football referee knows the rules of the game. The game of life cannot be played under conditions which remain constant from year to year, and law must change with life. Legal power includes comprehension of the principles of law evolved out of past experience; and in addition the training and ability to distinguish rules workable today from the unworkable, to discard outworn conceptions, to refuse to employ time-honored words without finding exactly what they mean. The principles of the past, after being thus clarified, are used and gradually extended to solve the complex problems of the judge's own time. If a whole court without this understanding of the law were installed in order to carry out a radical program which they heartily endorsed, they would accomplish very little. Their efforts to make a great leap forward would be futile for want of a solid jumping-off place, and they would be too confused to know whether in the end they were going backward or ahead. The ultimate tangled result would furnish no sound body of principles to guide either subsequent judges or ordinary citizens anxious to conduct daily transactions in such a way as to be safe-guarded by law.

All the talk about Marshall as a great statesman has obscured the fact that he based all his opinions on the words of the Constitution. He understood the law which he was applying. This, of course, meant more than knowing the clauses of the Constitution by heart. A judge interpreting a contract construes its words in the light of its purpose, and the more he knows of business, the better he understands the contract. So Marshall read the words of the Constitution so as to carry out the framers' purpose of founding a nation. Another man might have understood that purpose differently, but it is noteworthy that all his associates of the opposite party invariably agreed with him, with the exception of one decision where the split did not at all coincide with party lines. This indicates that the part which political views play is after all very small. And so probably with a judge's personal economic views. The so-called radical opinions of Justice Holmes proceed from a man who expresses a conservative view-point off the bench, in his letter on Economic Elements.[7] There is, indeed, a non-legal element in his making of law as with Marshall. Holmes interprets a statute or common law principle in the light of its purpose, and understands that purpose because of his open-minded comprehension of the human activities which law serves

[7] Holmes, *Collected Legal Papers*, p. 279.

only to regulate. So Lord Mansfield created modern business law because he understood business as well as law. Legal power is much; it is not all; but the important residuum in the equipment of a great judge is not, I believe, the possession of this or that political or economic or social view, but the desire to understand human life as well as embalmed legal experience.

The problem of the judiciary is, therefore, not the selection and easy removal of judges on a political or class basis, but the question, what methods will make it easier to place men of this legal and ultra-legal power on the bench, and after they are there will enable them to keep in continuous fruitful contact with the changing social background out of which controversies arise.

Beard, (4th Ed.), pp. 284–302.
Kimball, *National Government,* pp. 379–422.
Ogg and Ray, (2nd Ed.), pp. 407–434.

X

FINANCE

The financing of the national government has assumed a very important place in the minds of the American people. The prosecution of the World War necessitated the expenditure of sums which were staggering to the average citizen, who for the first time began to think in terms of national taxation. The passage of the Income Tax Amendment in 1913 gave Congress power to raise vast amounts from individuals who never before had contributed directly to the national government. Discussion of the payment of the millions loaned to our Allies during the World War has created another angle of interest in national finance. The development of the budget system has provoked interest, but the slogan of "economy and efficiency" of the Harding and Coolidge administrations has brought home the problem of taxation in a more effective way. The framers of the Constitution gave the power of taxation to Congress to correct a defect in the government of the Confederation, and for generations, barring the period of the Civil War, attention was rarely called to this power of Congress except in regard to tariffs and other forms of indirect taxation, which were considered from the standpoint of protecting infant industries, or controlling the liquor traffic, tobacco trade, etc. The income tax, the corporation tax, the tax on automobiles, have changed this attitude. They affect every-day life, and academic discussions of taxing power give way to the discussion of the relation of taxes to the cost of living. Economic conflicts have grown up and lines have been drawn over the rates of taxation. Congress has extended its financial powers not only to include the raising of revenue but also to control and to prohibit the production of certain commodities, such as those made by child labor (declared unconstitutional), oleomargarine, white phosphorus matches, drugs, etc. It has created a national bank, the Federal Reserve System, and Federal Farm Loan Banks. The Constitution has remained the same apart from the income tax amendment, but national development has moved forward and with it has come a new interpretation of the words used in 1787.

40. THE FEDERAL TAXING POWER[1]

By Walter Thompson

While the commerce clause has been the principal basis for federal legislation which partakes of the nature of police regulations, there

[1]Reprinted from *Federal Centralization,* Harcourt, Brace & Co., New York, 1923, by permission of the author and publishers.

are some other provisions in the Constitution which merit consideration in this connection. These are the provisions dealing with the power of Congress to levy taxes, the treaty power, and the congressional power to establish and maintain a postal system. In time of war, the war powers of the federal government have been exercised in such a manner as to conflict with the jurisdiction of the states. This, however, has taken place only under unusual conditions and has furnished comparatively little litigation over conflicting jurisdictions. In the previous chapter it was noted how, through its power to regulate interstate commerce, the federal government has frequently come into conflict with the states in the exercise of their police powers. The taxing power, treaty power, and power to regulate the mails have not so frequently brought about such a conflict, but nevertheless have been of great importance in extending the jurisdiction of the central government into the domain of the states. Together with the commerce clause, the constitutional provisions for the exercise of these powers have been practically the only basis for what, for the lack of a better term, might be called the national police power. It is the purpose of the present and the two following chapters to examine briefly these powers in their constitutional and historical foundations and to indicate the course they have taken and might take in serving as a basis for congressional legislation on matters which the states also regulate through their power to enact police regulations.

The tragic weakness, as every student of history knows, of the central government under the Articles of Confederation was the lack of provisions for the effective exercise of those vital powers which an independent government must exercise in order to properly function. This is clearly indicated by the provisions for the taxing power contained in the Articles. Article VIII provided that:

> All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in congress assembled, shall from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

The weakness of this provision is obvious. In the first place, the quota to be exacted from each state was to be determined solely

on the basis of ownership of land, which manifestly might be unfair. In the second place, and of far greater consequence to the life of the confederation, the central government had no way of compelling the states to furnish their respective quotas. The states vied with one another in withholding these taxes and the central government was unable to meet its obligations.[2] Consequently, the necessity of clothing the federal government with an independent taxing power was one of the most important of the considerations which brought about the Federal Constitutional Convention.

The Constitution provides that Congress shall have power "To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."[3] It is significant that this clause was placed first among the provisions dealing with the powers of Congress. From the general nature of the language of the clause it would appear that the framers of the Constitution were willing to take heroic measures in order to insure the federal government an independent source of revenue.

But if the purpose of the taxing clause was to make the federal government independent of the states in the collection of its revenues, it is also clear, from the records, that the fathers of the Constitution did not intend that, in the exercise of its taxing power, the central government should encroach upon the authority retained by the states. Through its taxing power a government may discourage certain enterprises and practices. A tax may be levied for regulatory rather than for revenue purposes. The members of the Constitutional Convention were not blind to this fact. In the general language of the taxing clause they saw the dangers of Congress enacting police regulations through its power to levy and collect taxes. When the clause came up for consideration in the convention, it precipitated a spirited intersectional debate.[4] The members from the South were apprehensive lest the taxing power might be used to discourage the slave trade and to favor the interests of one section of the country to the detriment of another section. Consequently when the Constitution finally emerged from the convention the taxing power of Congress was qualified by several restrictions. Congress could not tax the exports from any state,[5] it could not give a preference to

[2] For a lucid discussion of the difficulties confronting the central government under the Articles of Confederation, see John Fiske, *Critical Period of American History,* Boston, 1888.

[3] Art. I, sec. 8: 1.

[4] *Madison Papers,* III, pp. 1378–1396.

[5] Art. I, sec. 9: 5.

ports in different states,[6] taxes must be uniform throughout the United States,[7] and direct taxes could only be levied in proportion to population.[8] The importation of slaves could not be prohibited prior to 1808, and to prevent the taxing power from being used to abolish this traffic, a head tax of $10 was fixed as the maximum that could be levied upon the importation of such persons.[9]

These restrictions were primarily designed to prevent the national government from encroaching upon the states through its exercise of the taxing power. That they are real restrictions is seen when one considers that by them the taxing power was changed from the sweeping power which the taxing clause vested in Congress to a power which permitted Congress to levy mainly indirect taxes and to levy these only under certain constitutional stipulations. The restrictions, however, did not handicap Congress in raising revenues. Congress could determine the amount of the imposts and excises and could always exact enough returns to meet the expenses of government. But by these restrictions Congress was handicapped in levying taxes for regulatory rather than for revenue purposes.

The wording of the taxing clause at first glance seems clear and unambiguous. Still a great many controversies have centered about the extent of power that is given to the federal government by this clause. These controversies, in the main, have centered about the question: For what purpose may Congress levy and collect taxes? The clause itself would seem to provide that the purposes for which Congress may levy taxes are "To pay the debts and provide for the common defense and general welfare of the United States." This was the interpretation Jefferson gave to the clause in his opinion on the constitutionality of the Bank of the United States.[10] But "To provide for the common defense and general welfare" is a broad phrase and more careful delineations have been attempted. In general, it may be said that there are three views prevailing regarding the purposes for which Congress may tax. First, there are those who hold that the taxing power may be invoked only for the purpose of raising revenue. Secondly, there is the view that Congress may use the taxing power in order to carry out any of its other delegated powers. Finally, it is asserted by some that through the taxing power Congress may exercise powers not specifically granted by

[6] Art. I, sec. 9: 6.
[7] Art. I, sec. 8: 1.
[8] Art. I, sec. 9: 4.
[9] Art. I, sec. 9: 1.
[10] *Jefferson Correspondence,* vol. 4, pp. 524, 525.

the Constitution and only incidentally related to the raising of revenue.[11]

A brief analysis of these views may serve to clarify the problem of the extent to which Congress, in the exercise of the taxing power, can legislate on matters which are also subject to state legislation.

The view that federal taxes may be levied only for revenue is substantiated by several considerations. To the mind of the average layman a tax means money exacted from the individual by the government to meet the expenses of government. The idea of revenue is uppermost in his mind. This view also has been persistently, though not always consistently, held by the opponents of a protective tariff.[12]

To conclude that the taxing power vested in a government can only be exercised for the purpose of raising revenue is probably taking a too narrow view of that power. Story states that:

> Nothing is more clear, from the history of commercial nations, than the fact that the taxing power is often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles, for the encouragement and protection of domestic products, and industry; for the support of agriculture, commerce and manufactures, for retaliation upon foreign monopolies and injurious restrictions; for mere purposes of state policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes, as a bounty upon an infant manufacture, or agricultural product; sometimes, as a temporary restraint of trade; sometimes, as a suppression of particular employments; sometimes, as a prerogative power to destroy competition and secure a monopoly to the government.
>
> If, then, the power to lay taxes, being general, may embrace, and in the practice of nations does embrace, all these objects, either separately or in combination, upon what foundation does the argument rest which assumes one object only, to the exclusion of all the rest, which insists, in effect, that because revenue may be one object, therefore, it is the sole object of the power . . . ?[13]

[11] For this classification of it, the author is indebted to Professor Cushman. See Robert E. Cushman, "Studies in the Police Power of the National Government," *Minnesota Law Review,* IV (1920), p. 251.

[12] Such a view was taken by Calhoun during the Nullification Controversy in 1829. See *Works,* VI, pp. 1–59. The Democratic platform in 1912 declared it "To be a fundamental principle of the Democratic Party that the Federal Government under the Constitution has no right to impose or collect tariff duties except for the purposes of revenue. . . ."

[13] Joseph Story, *Commentaries on the Constitution of the United States,* 2 vols., 5th ed., Boston, 1905, I, 711.

Another eminent authority frequently quoted by the courts, Judge Cooley, emphatically declared, "Revenue is not and has never been the sole object of taxation." [14]

It also should be observed that the taxing clause itself furnished no basis for the contention that in the exercise of the taxing power Congress can levy taxes for revenue only. This is clearly and forcefully pointed out by Story in the following paragraph:

> If the common defense or general welfare can be promoted by laying taxes in any other manner than for revenue, who is at liberty to say that Congress cannot constitutionally exercise the power for such a purpose? No one has a right to say that the common defense and general welfare can never be promoted by laying taxes, except for revenue. No one has ever yet been bold enough to assert such a proposition.[15]

Finally, in considering the view that federal taxes must be for revenue only, it should be noted that the courts have never taken this stand. The securing of revenues has been the main purpose of taxation. For this reason the courts have been inclined to use this as a criterion when testing the constitutionality of congressional taxing legislation. If on the face of the act it is apparent that it was intended as a revenue measure, the courts have been inclined to uphold it even though the legislators enacting the law had a different motive. This was the attitude of the court in upholding a prohibitive tax on oleomargarine,[16] and in sustaining the Federal Narcotic Drug Act,[17] and a similar view was expressed in the recent child labor decision.[18] But to assume the validity of revenue as a purpose in taxation is not necessarily to assume that any other purpose is invalid. The Supreme Court has never held that revenue is the only purpose for which the taxing power may be exercised.[19]

[14] Thomas M. Cooley, "Federal Taxation of Lotteries," in *Atlantic Monthly*, LXIX, p. 523 (1892), quoted by Cushman, *Minnesota Law Review*, IV, p. 260. Cooley takes an opposite view in *Principles of Constitutional Law*, 3d. ed. Boston, 1880, p. 58.

[15] *Commentaries*, I, 712–713.

[16] McCray *v.* U. S., 1905, 195 U. S., 29.

[17] U. S. *v.* Doremus, 1919, 249, U. S. 86.

[18] Bailey *v.* Drexel Furniture Co. 1922, 66 L. Ed., 522.

[19] In favor of the view that the taxing power of the federal government can be invoked only for the purpose of raising revenue, it might be urged that a tax which is imposed for the purpose of making regulations deemed necessary for the public safety, health, or welfare is, properly speaking, not a tax. A number of authorities might be cited to show this. See Henry C. Black, *Constitutional Law*, St. Paul, 1910, 3d ed., 467; Thomas M. Cooley, *Law of Taxation*, 2 vols., 3d ed., Chicago, 1903, II, 1125; Ernst Freund,

It would appear that, while the raising of revenue is the principal purpose of taxation, it is not the only purpose for which the taxing power may be invoked. The second view which we have noted holds that this power may be used to carry out any of the other enumerated powers of Congress. This question has frequently come up in connection with protective tariffs. Alexander Hamilton was of the opinion that such a tariff could be imposed under the taxing power for the purpose of providing for "the common defense and general welfare." [20] If a tariff is so high that it is prohibitive, it is obvious that it is not a revenue measure. In such a case it would seem that the duty was imposed as a regulation of commerce rather than as a tax. Cooley notes this when he states that "perhaps even prohibitive duties may be defended as a regulation of commercial intercourse." [21]

The Supreme Court has never definitely endorsed this view in connection with protective tariffs but has done so in another connection. In 1866 Congress laid a prohibitive tax of ten per cent upon state bank notes.[22] The purpose of this tax was to protect the notes of the newly established national banks against the competition of state bank notes. This act was upheld in the case of Veazie Bank *v.* Fenno.[23] After stating that the tax was not a direct tax and that it could not be declared unconstitutional simply because it was excessive, the court went on to say that the imposition of such a tax was constitutional because under the Constitution the power to provide a circulation of coin is given to Congress and in the exercise of this power it might impose a tax such as the one in question. The court stated that, "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile. Viewed in this light, as well as in the other light of a duty

Police Power, Chicago, 1904, sec. 25; Emlin McClain, *Constitutional Law in the United States,* N. Y., 1907, 133. This, however, introduces the subject of using the taxing power to regulate matters which are only incidental to taxation and will be considered in that connection.

[20] *Works,* ed. by Henry Cabot Lodge, vol. IV, 151.

[21] *Principles of Constitutional Law,* 58.

[22] Act of July 13, 1866, 14 Stat. at L. 146.

[23] 8 Wall. 533, 1869.

on contracts or property, we cannot doubt the constitutionality of the tax under consideration." [24] In the Head Money Cases [25] the court took a similar view. In this case it was held that the imposition on ship owners of a tax of fifty cents for every alien immigrant brought into the United States by vessel was not an exercise of the taxing power, but was more in the nature of a regulation of commerce. It has even been held that a law requiring that a stamp be placed on goods intended for export in order to prevent fraud is not unconstitutional even though a charge is made for the stamp; [26] but if such a charge is made for the purpose of raising revenue rather than for regulation, it becomes a tax on exports and consequently is unconstitutional.[27]

In the face of these holdings it would be difficult to dispute that federal taxes may be imposed for other than revenue purposes. Such decisions clearly indicate that Congress may levy taxes as necessary and proper means of carrying out the powers that have been delegated to it. These cases are sometimes cited to prove that Congress may use the taxing power in a general regulatory way for the purpose of enacting police regulations. They prove nothing of the sort. To use the words of Professor Cushman, "In every case which the Supreme Court of the United States has been willing to recognize that Congress has levied taxes for purposes other than revenue, it has looked upon these taxes not as exercises by Congress of its granted power to tax, but as means employed for carrying out other delegated congressional powers." A tax need not necessarily be for the purpose of revenue, but if it does not have such a purpose, in order to be valid, it must have a reasonable relation to the furtherance of some delegated congressional power.

The third view of the taxing power which we have noted is that Congress, in the exercise of the taxing power, is not limited by considerations of revenue or the carrying out of its delegated powers, but may use this power to enact legislation which, constitutionally, it is not specifically authorized to enact and which is only incidental to taxation. Such a view of the taxing power is of vital importance in connection with a study of federal expansion. If this view were adhered to, it would mean that the jurisdiction of the federal government could be extended indefinitely into that of the states. It would mean that in the guise of laying taxes Congress could legislate on

[24] 8 Wall. p. 549.
[25] 112 U. S. 580, 1884.
[26] Pace *v.* Burgess, 1875, 92 U. S. 372.
[27] Almy *v.* California, 1860, 24 How. 169.

matters which constitutionally have been left exclusively with the several states.

This view has been defended on the ground that, outside of the restrictions on the exercise of this power contained in the Constitution, the power of the federal government to tax is as plenary as that of the states.[28] At first glance such a contention may seem logical. However, it must be remembered that it was the intention of the framers of the Constitution to establish a government of enumerated and delegated powers. The principle that Congress can exercise only those powers which have been granted to it by the Constitution is elementary constitutional law. The view that it might invoke the taxing power, as a general grant of power, to enact legislation which otherwise it could not constitutionally enact obviously is contrary to the theory of the division of powers between the central government and the states.

In order to show the attitude of the courts towards such legislation, a few instances might be pointed out where Congress, in the guise of taxing, has enacted what might be termed police regulations. In 1886 Congress levied a tax of two cents per pound on oleomargarine.[29] By an act of 1902 this tax was increased from two to ten cents per pound.[30] The act of 1902 also provided that oleomargarine which was not artifically colored to resemble butter should be taxed only one fourth of one cent per pound. These acts might be termed "dairy legislation." The motive of Congress was not so much the procuring of revenue as it was to protect the dairy industry and to secure the consumers against colored oleomargarine being fraudulently sold as butter.[31] The constitutionality of the act of 1902 was upheld in the case of McCray *v.* United States.[32] Chief Justice White, who delivered the opinion of the court, declared that this act was a revenue measure, that it was within the power of Congress to levy such a tax, and that the courts would not inquire into the legislative motive. In answer to the argument that such a tax was unconstitutional because it was prohibitive, the court stated that it was within the power of Congress to levy such a tax and that for

[28] In the debate on the oleomargarine tax law of 1886 Senator Edmunds maintained that, "the taxing power of the United States is just as extensive, just as supreme, just as illimitable as the taxing power of every state is." *Cong. Rec.*, July 19, 1886, vol. 17, p. 7139.

[29] 24 Stat. at L. 209.

[30] 32 Stat. at L. 193.

[31] See speech of Senator Spooner, *Cong. Rec.* Apr. 1, 1902, vol. 35, p. 3506.

[32] 195 U. S. 27, 1904.

the court to restrain the exercise of a lawful congressional power would be an encroachment upon Congress by the judiciary.[33]

In 1914 the Harrison Narcotic Drug Act was passed.[34] This act provided that narcotic drugs could be sold only under certain specified conditions by registered dealers and levied an excise tax of one dollar a year on such dealers. Obviously the purpose of this act was to control the drug evil by prohibiting the indiscriminate and clandestine sale of narcotics. To consider it a revenue measure because it imposed a tax of a dollar a year on registered drug dealers is absurd. The Supreme Court, however, held that it was a revenue measure and that the provisions in the act regulating the sale of drugs might be necessary for the administration and collection of the tax.[35]

The Narcotic Drug Act apparently approached the limits of congressional power to enact police regulations through the authority conferred by the taxing clause. In the decision sustaining this act four judges, including the Chief Justice, dissented on the ground that this was an exercise of power not delegated to Congress, but reserved to the police power of the states. When Congress, through the use of the taxing power, attempted to regulate child labor, the Supreme Court, in a recent decision, declared that this was overstepping the bounds of delegated congressional power.

The far-reaching influence of the child labor decisions is considered in another connection.[36] But a brief consideration of one of these decisions must be given here because of its bearing upon the taxing power of Congress. In the former act Congress had attempted to regulate child labor under its power to regulate interstate commerce. This act had been declared unconstitutional by the Supreme Court.[37] By an act of February 24, 1919, Congress again sought to regulate the labor of children by invoking the taxing power to this end.[38] The act of 1919 imposed a tax of ten per cent of the net profits of the year upon employers in certain industries who knowingly employed, during any portion of the taxable year, a child within the age limits prescribed in the act. This act was recently declared unconstitutional by the Supreme Court in the case of Bailey

[33] This statement was qualified by the observation that the manufacture of oleomargarine was regulated by the states, and by its nature was an industry that could be regulated without an interference with fundamental rights.

[34] 38 Stat. at L. 785.

[35] U. S. *v.* Doremus, 1919, 249 U. S. 86.

[36] *Infra.* chap. VIII.

[37] Hammer *v.* Dagenhart, 1918, 247 U. S. 251.

[38] 40 Stat. at L. 1057, 1138, chap. 18.

v. Drexel Furniture Company.[39] In its opinion, the court stated, that if this tax were "an excise on a commodity or other thing of value we might not be permitted, under previous decision of this court, to infer, solely from its heavy burden, that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction from a departure from a detailed and specified course of conduct in business." That course, the court stated, was that employers in certain industries should not employ children under certain ages. If an employer departed from this prescribed course he was to pay the government one tenth of his entire profits for a full year. It did not matter if such departure consisted in employing a thousand children for the entire year or one child for a day. The tax then must be considered as an imposition of a penalty for departing from a course of business prescribed by Congress. "In the light of these features," the court said, "a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulative effect and purpose are palpable." [40]

What for our purpose is most significant about this decision is that the court clearly saw the vast possibility for federal expansion into the jurisdiction of the states and the consequent diminution of the power of the states that might be realized by an unscrupulous exercise of the congressional taxing power. It would be difficult to point this out more lucidly than the court did in the following words: "Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states." [41]

From this brief survey of decisions some conclusions may be drawn. In the first place, it should be noted that the court will not consider the legislative motive. Even in the child labor decision this was not done. An examination of the debates in Congress while this bill was pending would have clearly shown that the motive was, not to secure revenue but, in the guise of exercising a constitutional

[39] 66 L. Ed. 522, 1922.
[40] *Ibid.*, at 524.
[41] *Ibid.*

power, to enact police regulations for which there was no constitutional authorization.[42] The act in question has been judged on its face and not by the motives that inspired it. The Supreme Court has upheld the federal tax on corporations on the ground that it was clearly a revenue measure.[43] On its face the oleomargarine act might be construed as a revenue measure. The same might be said, though with less certainty, for the narcotic drug act. At any rate, these acts did not palpably show that they were intended for police purposes. Consequently these acts were upheld by the court. The child labor law, on the other hand, on its face, showed that it was intended, not as a revenue measure, but rather as a police regulation. It would be difficult to construe this act as a revenue measure. For this reason it was not sustained by the court. From this we might conclude that if a federal act is to be constitutional, it must admit of the construction that it was intended either as a revenue measure or to further some delegated power of Congress. Or, to turn the case around, if such an act, on its face, shows that it was not intended as a revenue measure or to further some delegated power of Congress, but was intended to accomplish some other end, it will not be upheld by the courts. This, of course, undermines the third view of the taxing power which we have considered. But certainly, in the light of these decisions, the taxing power cannot be considered as a general grant of power. It can only be exercised to accomplish ends which are constitutional. These ends are the raising of revenue or the furtherance of congressional authority delegated by clauses other than the taxing clause.

The three views of the taxing power which have been considered deal mainly with the purposes for which Congress may exercise the authority to tax. There are some other limitations of this power which should also receive consideration. The child labor law did not impose a tax upon commodities. It imposed a penalty, in the form of a tax, upon the employer of children. Consequently the decision of the court on this legislation cast little light on the question of how far Congress can go in levying excise taxes upon commodities. That Congress may levy such taxes is not questioned. Excises have been an important source of revenue of the federal

[42] During the debate on the child labor bill Senator Lodge declared, "The main purpose is to put a stop to what seems to be a very great evil and one that ought to be in some way put a stop to. If we are unable to reach it constitutionally in any other way, then I am willing to reach it by the taxing power, which the courts have held can be used constitutionally for such a purpose. I see no other way to do it." *Cong. Rec.*, Dec. 18, 1918, vol. 57, 611.

[43] Flint *v.* Stone Tracy Company, 1911, 220 U. S. 107.

government since its establishment. On rare occasions, however, Congress has made these taxes so heavy as to render them prohibitive in their nature. In 1912 Congress prohibited the manufacture of matches made from poisonous phosphorus by subjecting these matches to a tax of two cents per hundred.[44] The tax on artificially colored oleomargarine also was a prohibitive tax. The question then arises, When may Congress levy taxes which are prohibitive? This question is partly answered in the Veazie Bank case.[45] In this case the court held that Congress could levy such a tax if it were necessary to protect itself in the exercise of one of its enumerated powers. More light is thrown by dicta of the court in the McCray case.[46] In this case the nature of the article which was taxed was discussed and considered a determining factor. The court stated that:

> It has been conclusively settled by this court that the tendency of that article (oleo) to deceive the public into buying it for butter is such that the states may, in the exertion of the police powers, without violating the due process clause of the Amendment, absolutely prohibit the manufacture of the article. It hence results, that even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the 5th Amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution.[47]

Such dicta indicate that if the nature of the object taxed is such that it can be prohibited without violation of fundamental rights, the federal government may prohibit it by taxation. On the other hand, the taxing power could not be used to prohibit a calling which might be pursued as of constitutional right. This is again indicated in the concluding paragraph of the opinion in the McCray case when the court said:

> Let us concede that if a case as presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind

[44] 37 Stat. at L. 81. The constitutionality of this legislation has not been tested in the courts.

[45] 8 Wall. 533, 1869.

[46] 195 U. S. 27, 1904.

[47] *Ibid.*

that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.[48]

If there is a reasonable basis for the classification, Congress may single out certain objects and levy excise taxes upon these objects. If the nature of these commodities is such that a person does not have a constitutional right to manufacture or sell them, Congress may levy prohibitive taxes upon these objects without a violation of rights secured to the individual by the Constitution. By historical usage certain callings have become subject to governmental regulation to the extent that a person may not pursue them as of constitutional right. Trafficking in intoxicating liquors, gaming, and various types of amusements are such callings. They have always been subject to governmental regulations by the states. In the light of the dicta in the McCray case, the federal government could probably levy prohibitive taxes in such cases without a violation of constitutional rights. Congress, in the exercise of its taxing power, could then enact important police regulations. It is questionable whether a constitutional amendment was needed in order to empower the federal government to prohibit the liquor traffic. Such a regulation might have been accomplished by the use of prohibitive taxes.

There are a few other restrictions on the federal taxing power which are so familiar that they need only to be mentioned in passing. Among these might be mentioned the constitutional restriction that all taxes must be uniform, that direct taxes must be in proportion to population,[49] that no preference shall be given to different ports, and that no taxes shall be levied upon the exports from any state. Then there is the implied restriction that the federal government cannot tax the government, functions, or agencies of the states.[50] There is also the restriction that taxes must be levied for a public purpose.[51]

[48] 195 U. S. 27, 1904.

[49] This has been modified by the Sixteenth Amendment with regard to federal income taxes.

[50] Collector *v.* Day, 1871, 11 Wall. 113.

[51] Loan Association *v.* Topeka, 1875, 20 Wall. 655.

In conclusion, and by way of a summary, the following points should be noted in connection with the federal taxing power:

(1) The taxing clause does not contain a general grant of power. It is merely one of the enumerated powers given to Congress by the Constitution. The framers of the Constitution, however, realized that the taxing power might be used by Congress to the detriment of the powers of the states and consequently hedged it in with restrictions.

(2) The only ends for which the taxing power may be employed is to raise revenue or to aid the federal government in the exercise of one of its delegated powers. It cannot be used ostensibly for police purposes. But the courts will not inquire into the legislative motive and will sustain an act purporting to levy a tax unless such a measure shows on its face that it was not intended for revenue or in furtherance of a delegated power, but was intended to accomplish ends which Congress was not authorized to accomplish directly.

(3) Congress may levy prohibitive taxes if they are necessary to secure the federal government in the exercise of its delegated powers. In the light of dicta from the McCray case it seems probable that such taxes can also be levied when the business is one that cannot be pursued as of constitutional right.

(4) Finally, the federal taxing power is restricted by certain expressed and implied limitations.

41. THE NATIONAL BUDGET SYSTEM AND THE FINANCIAL SITUATION FACING THE UNITED STATES[1]

By General H. M. Lord

A budget is a detailed statement of expected receipts and proposed expenditures, prepared prior to the period to which it pertains. The Budget and Accounting Act, approved by President Harding June 10, 1921, provides for just that, with the requirement that if the Administration's detailed statement of proposed expenditures called for more funds than the detailed statement of expected receipts evidenced would be available, the president should submit as part of the budget his recommendation of ways and means to secure the additional revenue required to finance the spending program recommended. The Budget and Accounting Act of June 10, 1921, provided an agency for carrying out the terms of the act, termed the bureau of the budget. This bureau was created as an instrumentality directly under the control of the president for the purpose of enabling

[1] An address before the National Municipal League at Philadelphia, Nov. 23, 1922. Reprinted from the *National Municipal Review*, February, 1923, by permission of the publisher.

him to make effective his responsibility to congress and to the country for the efficient exercise of his administrative authority over the operation of the budget and over the expenditure of funds thereunder appropriated for the support of the government. It was established solely upon the principle of presidential responsibility, and it is given no function under the Budget and Accounting Act which it can exercise independently of the president. This is as it should be, for the president is the head of the business organization of the government.

THE COMPTROLLER GENERAL

The Budget and Accounting Act also created an establishment of the government known as the general accounting office, which is independent of the executive departments and under the control and direction of the comptroller general of the United States. Among the duties devolving upon the comptroller general are those of prescribing the forms, systems, and procedure for administrative appropriation and fund accounting in the several departments and establishments of the government and for the administrative examination of fiscal officers' accounts and claims against the United States. The comptroller general has already placed in effect a classification of objects of expenditure for the departments and establishments of the government for the purpose of obtaining uniformity in administrative appropriation and fund accounting and in the analysis of governmental expenditures. This is a long stride in the direction of uniformity of fiscal accounting, and marks the beginning of the plans of the comptroller general to establish uniformity in the accounting system for governmental expenditures.

I plan to confine my discussion, however, to the subjects of governmental estimating for funds, control of expenditures, and the co-ordinating of the federal business activities—a discussion of the routine business of the federal government.

GETTING THE MONEY

One of the most necessary things in a business—and the United States government is the biggest business in the world—is to get the money for operating purposes. Heretofore the estimates were prepared by a multitude of uncoördinated agencies, and when brought together in the book of estimates for submission to congress represented no administrative policy, had been compiled without regard to treasury conditions, and were always greatly in excess of actual

operating needs. From 1890 to 1922 the estimates submitted by the executive departments were twenty-three billions in excess of the appropriations made. Under the budget law this most undesirable, unscientific and expensive system has given way to a method of actual, careful estimating. Under the law each head of a government agency charged with the administration of public funds appoints a budget officer, who is charged with the preparation of estimates for his department. Through contact with the bureau of the budget he is informed of the administrative policy and of treasury conditions, and is expected to prepare and is in a position to prepare and submit to the head of his department an estimate that will fit into the national program. The various departmental estimates, prepared in this scientific way, approved by the departmental heads, are forwarded to the bureau of the budget. Here they are submitted for careful examination to investigators, one for each department, whose entire time is devoted to the work of that department, who know its genesis, organization and functions, and who have been available for assistance to the corresponding budget officer in preparing the estimate. Comparison is made of the estimates from one department with estimates from other departments, duplications eliminated, modifications and necessary reductions made, the conditions of the treasury studied, and the entire collection—estimates from the forty-three departments and independent establishments of the government —dove-tailed together, welded into a harmonious whole, reflecting in dollars and cents the policy of the administration. During this process the bureau of the budget consults frequently with the chief executive and the department and establishment heads so that the budget will really represent the actual needs of the government and the policy of the administration. The budget, prepared in this way, is then submitted to congress by the president, with recommendations of ways and means of procuring additional revenue, if the income from established sources is not sufficient to finance the spending program recommended. Heretofore chiefs of departments and independent agencies could submit estimates for appropriations to congress without restraint. Under the budget law all requests for appropriations must be submitted to the bureau of the budget, for submission to the chief executive, in whom is vested the exclusive power of submitting estimates to Congress.

APPROPRIATING THE MONEY

As a result of the enactment of the budget law a great revolution has taken place in the organization of the house and senate along

appropriating lines. Today all appropriations of the government are made on bills reported to congress from one committee, the appropriations committee of the house, and the appropriations committee of the senate. This arrangement affords opportunity for comparing the estimates of one bureau with those of another, and permits consideration of the country's needs as one complete study by one committee acting for the house and one committee acting for the senate.

Under the operation of the budget law the annual appropriations for each department now all appear in one act, and it is not necessary in order to find how much money is available for a department or agency to search through several different appropriation acts for that information. This is certainly a long step in advance along the road of proper governmental financial procedure.

SPENDING THE MONEY

As under the old procedure there was no coördination for estimating or appropriating, so there was no coördination of expenditures. The amount appropriated was regarded as the minimum to be spent. The late Andrew Carnegie said at one time that he considered it a crime to die rich. The spending agencies of the federal government seemed to feel that way about their appropriations, and that it was inexcusable to terminate a fiscal year with an unobligated balance of an annual appropriation in the treasury. Some years ago a government official, having a considerable balance, promptly turned it back into the treasury, reaping therefore contumely, scorn and criticism instead of expected plaudits and commendation. These governmental officials, however, simply carried out what was understood to be the wishes of congress in those days of generous excesses of treasury receipts over liberal expenditures. Times have changed, however, and under the existing order of things the amount appropriated is intended to be the maximum of expenditure, with pressure for such efficient and economical administration as will produce the desired result with an expenditure less than the appropriation.

The coördination and control of expenditures, at this time without doubt the most important and urgent need of the government, is also the most difficult of realization. With the installation of the budget system the president of the United States, for the first time in the history of this country, assumed his proper place as the actual head of the business organization of the government, accepting in so doing all the great and trying responsibilities that such assumption of direct leadership entailed. The budget law gave him

an agency for imposing policies of economy on the government's many establishments, an agency which he is utilizing and proposes still to utilize for the purpose of saving millions of dollars of the people's money.

THIS YEAR'S FINANCES

The best estimate of proposed expenditure for the fiscal year 1923, as of July 1, 1922, is $3,771,258,542. This includes the amounts the spending agencies of the government estimate they will expend; it includes also $489,231,368 customs refunds, pensions and other items not subject to administrative control; includes $330,300,000 for reduction in the public debt, $34,362,000 investment of trust funds; and carries also $975,000,000, interest on the public debt. Of course, no account can be taken of further demands which may result from legislation yet to be enacted for this current fiscal year by congress. All of this adds interest to an already interesting problem.

The best estimate of ordinary treasury receipts from all sources for this fiscal year is $3,098,825,311. This includes $1,300,000,000 expected from income and profits taxes, $900,000,000 from miscellaneous internal revenue, with a grand total of $523,825,311 miscellaneous revenue which includes $225,000,000 from interest on foreign obligations.

Thus the excess of estimated expenditures over estimated receipts is $672,433,231.

Expenditures must be reduced and projects that can be postponed to a subsequent and more favorable season must be so deferred. The departments and independent establishments of the government, in compliance with the recommendation of the president, have set aside in a fund termed a general reserve an amount totalling many millions of dollars which they will try and save. This money is not subject to obligation by the spending agencies in a department without specific authority from the department head. These agencies are expected to plan their program for the fiscal year as if the amount in the general reserve did not exist. The anti-deficiency act, which requires apportionments of funds over an entire year to prevent exhaustion of appropriations in the first half of the year with resulting deficiency appropriations, is being strictly enforced, not only with a view to prevent deficiencies, but with an eye on attendant economies through restricting the activities for each quarter to the money allotted to that quarter.

Another factor in the solution of this problem is the increase of revenues from established sources. One of these is the sale of

surplus property. There is included in the anticipated receipts for 1924 the sum of $80,000,000 as the expected yield from sales of supplies. The surplus supply situation is being intensively studied with a view to so accelerating the declaring of surplus and its sale that additional and needed millions may be added to miscellaneous receipts of the treasury. Other sources of revenue are being studied for the same purpose—increase of ordinary receipts. It is an interesting problem that means a dogged, persistent, tireless fight until the treasury closes at half-past four, the afternoon of June 30, 1923. And if when the returns are all in, and the budget for the fiscal year 1923 is balanced, it will be due to the firm and businesslike stand taken by the president, the coöperation of the business personnel of government, and the indorsement of the people at large who realize the importance of the problem and the direct bearing it has upon them.

NEXT YEAR'S FINANCES

Coincident with the task of reducing expenditures and increasing revenues for the current operating year is the work of preparing estimates for funds necessary to finance the administration for the next fiscal year which will begin July 1, 1923. Estimated receipts for next year, compiled by the treasury department, amount to $3,198,456,871. The president, carrying out his policy of keeping expenditures within receipts, informed the personnel of the business organization of the government at its second annual meeting July 11, last, that he would approve no estimates which with existing authorizations of expenditure would total more than that amount. The forty-three departments and independent establishments of the government are required by law to submit their annual estimates to the director of the bureau of the budget not later than September 15. For the purpose of getting a bird's eye view of the needs of the executive departments, call was made by the bureau of the budget for the submission of preliminary estimates, without supporting detail, August 1. In this call attention was invited to the instructions of the president and his additional statement that the estimate of receipts for 1924 evidently would not permit as liberal appropriations for 1924 as had been granted by congress for 1923. When the preliminary estimates were received, however, it was found that not only were they many millions in excess of the current year's appropriations, but nearly $200,000,000 in excess of the estimated receipts for the next fiscal year. The director of the budget, then, with the approval of the president, took each estimate, cut it down, item by

item in the light of the best information available as to the merits of the various projects, combined the resulting totals and found he was within the maximum amount fixed by the president—expected receipts for the next year. Then by direction of the president the budget director allocated the new total of each estimate to the department concerned, with instructions to distribute that amount over its various activities and projects, and submit the result as the regular estimate September 15. The estimating agencies were notified at the same time that if the amounts falling to any item or group of items under this plan were inadequate a full presentation of the case should be made when the estimates were submitted and the statement would be given consideration. This accomplished what was intended, a complete reversal of former procedure under which there was little or no limit or restraint upon the amounts that could be estimated for, the reviewing authority being obliged to prove that the amounts requested for the several items were too large. Anyone familiar with the enthusiasm and surpassing ability with which the experts in the departments defend their estimates, no matter how swollen, will appreciate the utter hopelessness of that task when the field to be covered involves items of estimates numbering hundreds if not thousands. Under the new procedure the proponents of the estimates must justify and prove the need of increases over the amounts allocated, which is an altogether different procedure. This will give you some idea of what the Budget and Accounting Act has made possible in the important field of estimating.

THE BUDGET BUREAU NON-POLITICAL

There is one point that I wish to emphasize at this time, and that is that the bureau of the budget is in no sense of the word a political agency. The budget movement in its inception, both in the country and in congress, was absolutely non-political. The proposal for the establishment of a national budget system was advocated by chambers of commerce and other commercial bodies and trade associations throughout the country regardless of political or geographical division. It was favored by both President Taft and President Wilson, and received indorsement in the platforms of all political parties. When the budget proposal was before congress experienced leaders of both parties served on the select budget committees of the house and senate, and in the preparation of the bill party lines were completely obliterated. The measure was advocated with equal enthusiasm on the floor of the house and the senate by Democrats and Republicans, and it passed the senate with-

out a dissenting vote, while only three votes were recorded against it in the house. No other conception of the budget bureau than as a non-political, impersonal agency is proper, and any attempt to construe its purposes otherwise than for the general good of the country irrespective of party would be most unfortunate and disastrous, and seriously hamper its legitimate activities.

NOT A MAGIC WAND

The Budget and Accounting Act is not itself a magic wand that waves out all faulty financial procedures and beckons in the financial millennium. Habits, customs, regulations, laws that the passage of a hundred years or more has built into the very machinery of the government are not eradicated over night. The most flagrant faults will be corrected first, but it must be a continuous process, that will require years of patient, persistent, and courageous endeavor, with the unwavering, vigorous support of the executive, the co-operation of the personnel of the government, and the watchful interest and intelligent indorsement of the people of this country.

42. THE CHILD LABOR DECISION[1]

By Edward S. Corwin

Is the Supreme Court entitled to define the purposes for which Congress may exercise its taxing powers, and if so, why not of all its powers? These are the fundamental questions raised by the recent decision of the Court in Bailey vs. The Drexel Furniture Company, setting aside Title XII of the Revenue Act of 1921, which purported to levy a special tax amounting to ten percent of their net profits on certain classes of concerns employing child labor. The following words of Chief Justice Taft's opinion for the Court indicate the principal grounds of the decision:

> Taxes are imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characterization of regulation and punishment. Such is the case of the law before us.

[1] Reprinted from the *New Republic*, July 12, 1922, by permission of the author and publisher.

One might pause to point out that there is something of a contradiction between an incidental motive of discouraging and a primary motive of raising revenue from the thing discouraged. Passing that by, however, these words reveal clearly the initial difficulty in the way of the decision. In attempting to define the taxing power of Congress by an alleged "primary" purpose the Court is forced to attempt to penetrate Congress's motives in enacting specific tax measures, and furthermore to classify these motives, as it does in this case, into "primary" and "incidental." It had hitherto been supposed that the Court could not do this. Thus in McCray vs. United States (195 U. S.), in which the Congressional tax on yellow oleomargarine was attacked as destructive of the subject matter and, therefore, obviously a measure of regulation rather than of taxation, the Court, speaking through the late Chief Justice, answered:

> It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary: to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore, it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers, is to be corrected by the abuse of its powers by another department.

Chief Justice Taft would appear to answer that the special levy on the profits of employers of child labor offered a clearer case of abuse of power than did the tax on oleomargarine. But this answer clearly does not touch the main proposition laid down in the McCray case as to the intrinsic limitations on the Court's own power; and, furthermore, its substantial accuracy is open to challenge. The regulatory purpose of the later tax was, Mr. Taft urges, "palpable" and apparent "on the very face of its provisions." But if the regulatory purpose of the oleomargarine tax was not also matter of common knowledge, at least that of the tax on state bank issues which was sustained shortly after the Civil War in the case of Veazie vs. Fenno (8 Wall.) was. Indeed, the Court itself took cognizance of it—as Mr. Taft's own references to the case show—yet they sustained the law involved *as a tax*, going at length into the

question whether it was a "direct" tax within the meaning of the Constitution and exonerating it from that charge.

But I submit further that a special tax on the profits of concerns employing child labor, viewed simply as a revenue-raising measure, is by no means an extravagance. That special profits accrue to such concerns directly from their occupying a degraded plane of competition is certainly a widely held belief and a well-warranted one; why then should not the government regard such profits as a proper source of revenue? That certain features of the tax on employers of child labor disclosed an expectation in Congress that the tax would have some effect on child labor employment and recognition that this effect ought to be kept in proper channels, may be conceded, but the concession does not vindicate the Court's conclusion as to the "primary motive" of the act. "On the face of it" what the act did was to impose a levy to be collected annually through the Treasury Department and to be measured by profits which were directly attributable, at least in part, to the occasion of the levy. And what is this but to describe an excise?

It is, therefore, abundantly clear that in undertaking to determine the relative weight of the motives which governed Congress in the enactment of the tax on employers of child labor, the Court essayed a somewhat delicate task, and one, be it emphasized, which it has hitherto declined to attempt. In short, the Court has set up a new canon of Constitutional law, and one which it must experience great difficulty in manipulating. The stigmata of ulterior purpose can be easily avoided in future cases, and the Court will be driven back on its own unaided intuitions. When this happens it will find itself confronted with an embarrassing dilemma: either it must enter more and more upon the hazardous business of legislative psycho-analysis; or repenting of its somewhat hasty claim to greater insight than its predecessors, it must abandon its abortive doctrine. Parturient montes, nascetur ridiculus mus.

But the question of its enforceability aside, let us consider for a moment the intrinsic validity of Chief Justice Taft's assertion that "taxes are imposed . . . with the primary motive of raising revenue," viewed as a principle of Constitutional law. The late Professor Maitland once remarked upon "the importance of commonplaces" in determining the content of Constitutions, and Mr. Taft's assertion perhaps illustrates the observation. Nevertheless, it is to be feared that in this case the endeavor of the Court to elevate everyday wisdom into Constitutional law has led it to attribute to popular ideas a precision they are far from possessing. No doubt, it is generally

held that the *ordinary* purpose of tax laws is the raising of revenue; but to pass from this fact to the deduction that the *primary* purpose of revenue raising is an invariable ingredient of the idea of "tax" which must be satisfied in every specific instance of taxation is to move somewhat briskly. The American people know something of their legislative history in this respect. They are fully aware that almost every customs revenue act which has been passed since the beginning of the government has enacted whole schedules which were designed not for the purpose of raising revenue at all but for the purpose of excluding goods from the country. And yet are such duties any less "duties"—and so "taxes"—within the sense of the Constitution? If so, why are they subject to the requirement that they be "uniform throughout the United States"?

The peculiar danger, however, of the regulatory feature of the Child Labor tax, Chief Justice Taft further urges, is that it reaches matters not otherwise subject to national power, but falling under the control of the police powers of the states. This type of measure carried far enough, he says, would "completely wipe out the sovereignty of the states." What, however, is "the sovereignty of the states," within the Constitution? Mr. Taft refers only to the tenth amendment, which recognizes certain powers as being reserved to the states, but only on condition of their not having been delegated to the United States; and when they conflict with powers delegated to the United States the latter, by Article VI of the Constitution, have the right of way. It results that the powers of the national government are, generally speaking, to be defined quite indifferently to the existence of other powers in the states with which they may come into conflict in attempting to control the same subject-matter.

This was the view of Madison, uttered in the earliest years of the Constitution: "Interference with the powers of the States," said he, "is no Constitutional criterion of the power of Congress"; it is the view of the Court itself in the Minnesota rate cases (230 U. S.) and the cases following in the wake of these. That it was the view of Chief Justice Marshall needs hardly to be stated; his fundamental canon of Constitutional construction was that, while the national government was one of the enumerated powers, within the field of the powers granted it was a sovereign government.

Nor does the passage which Chief Justice Taft quotes from Marshall's opinion in McCulloch vs. Maryland militate at all against this view: "Should Congress," it runs, "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of

this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." The implication which Chief Justice Taft seemingly would read into these words is that, in respect of the choice of purposes for which it may exercise its powers, the national government is not a sovereign government; that its powers were given it for limited objects, and that the Court must hold it to these objects. Never was a quotation more entirely misapplied. As the words themselves show, Marshall was here speaking not of Congress's substantive powers but of the instrumental powers conferred upon it by the "necessary and proper" clause. Naturally, instrumental powers must be kept instrumental—that is precisely their difference from substantive powers, which are sovereign powers and carry with them sovereign discretion in their use. That Marshall had no idea that the Court might censor the purposes for which the substantive powers of government, and least of all the taxing power, might be exercised, is proved by this very case of McCulloch vs. Maryland. The question at issue was whether Maryland had the right to tax the operations of the Bank of the United States. Counsel for the state urged that the state ought to be trusted to exercise its power reasonably and considerately, which argument Marshall answered with his famous maxim, that "the power to tax involves the power to destroy." In other words, concede the state the power to raise revenue from the bank and it would be free to use the same power to drive the bank from the state. It is submitted that this line of reasoning is fatally at variance with the doctrine of Bailey vs. the Drexel Furniture Company.

To sum up: The logic of the decision of this case, overriding previous decisions, makes the Court the supervisor of the purposes for which Congress may exercise its Constitutional powers. It thus cancels out the third dimension, so to speak, of the sovereignty of the national government within the field of its granted powers. At one stroke a new canon of constitutional interpretation is created and an out-of-date one revived: legislative motive becomes a test of legislative action; and any effort on the part of Congress to bring within its control matters heretofore falling to the states alone, raises the question of valid motive. The notion of the coöperation of the national government and the states in the furtherance of the general welfare, which was voiced a few years ago in Hoke vs. United States (227 U. S.) has apparently dropped out of view. The one thing to be said for the new doctrine is that it will probably prove so unworkable in practice that it will not long survive.

Meantime we may fairly retort upon the Court the question which

it has put Congress: What was its "primary" motive? It is only a surmise, of course, but perhaps not too wild a one, that the Court has been influenced by the talk of a break-down of local self-government within recent years, and especially in consequence of national prohibition. The reflection is prompted that if the Court will cast its eye back over the last thirty years, it will have reason to conclude that it must itself shoulder some of the responsibility or credit for national prohibition, since it was another happy idea which, overruling the precedents of half a century, in the case of Leisy vs. Hardin (135 U. S.), started the agitation which culminated in the eighteenth amendment. Judicial adventures in saving the country have not always worked out quite as they were planned to.

But a more important lesson, too, is suggested by this decision and the broadening discussion affecting the whole doctrine of judicial review to which it has given rise. The Supreme Court is, first of all, a court of justice and justice is a matter which touches individuals much more immediately than it does governments. The Constitution contains many provisions designed to safeguard individual justice —for instance, those of the fifth and sixth amendments, and those of the first section of the fourteenth amendment—and the enforcement of these provisions the individual is entitled to claim directly from the Court. Of other provisions and principles of the Constitution, however, and especially of those which are designed to distribute power within the structure of government erected by the Constitution, the individual is only the indirect beneficiary. Yet even within this field the Court has a clear mandate from the Constitution to intervene to secure the supremacy of the Constitution itself and of the national laws, against conflicting state legislation. On the other hand, when we view the question of judicial review from the side of national power, a different principle is recognized both in the Federalist and in Marshall's decisions. This, in the words of the latter, was that "the wisdom and discretion of Congress, their identity with the people, and the influence with their constituents possess at election" were "the sole restraints" upon which the people had relied to secure them from abuse of its powers by the national government. "They are," he adds, "the restraints on which the people must often rely solely in all representative governments." Surely these words are still applicable. In the light of them, Bailey vs. the Drexel Furniture Company must be written down as a piece of grandmotherly meddling, certainly wrong in principle, even though it does not prove actually mischievous in the final result.

43. EARLY HISTORY OF FEDERAL BANKING LEGISLATION[1]

By E. A. Goldenweiser

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Two central banking institutions of large resources were established in the early period of our history under acts of Congress granting to them exclusive banking privileges, and although each of these institutions fulfilled the purposes of its incorporation in providing a uniform, safe currency and in rendering services as the fiscal agent of the Government, each failed nevertheless to secure from Congress a renewal of its charter.

The act incorporating the First United States Bank, drawn in accordance with a plan submitted by Hamilton, became a law on February 25, 1791. Incorporated for a period of 20 years, with an authorized capital of $10,000,000, the bank appears to have been well managed from first to last. It had authority to loan on real estate, to issue bills and notes receivable in payment of all debts to the United States, and to establish branches for discount and deposit anywhere in the discretion of its directors. Its charter expired on March 4, 1811, and was not renewed.

For several years following, including the war period, public receipts were deposited in selected State banks. The note circulation of these depositories and of State banks generally increased rapidly in the war period. In 1814, Secretary Dallas recommended establishment of a national institution as "the only efficient remedy for the disordered condition of our circulating medium." The act incorporating the Second Bank of the United States, with a capital of $35,000,000 was signed by President Madison on April 10, 1816, and the bank began operations on January 7 of the year following at what is described as the "worst stage of the monetary troubles" consequent upon the suspension of specie payments in 1814.

The charter provisions under which the first and second banks of the United States operated were essentially similar. In each case the Government subscribed for one-fifth of the capital, paying its subscription in Government stocks. Private subscriptions were payable one-fourth in specie and three-fourths in Government stock. The directors were authorized to establish branch offices; public re-

[1] Reprinted from the *Congressional Digest*, March, 1926, by permission of the editor.

ceipts were to be deposited in the bank and its branches for transfer and disbursement; and bills and notes of the bank were receivable in payment of debts to the United States. The first bank established eight branches, and in 1829 the second bank was operating 25 branches.

President Jackson in his first message in 1829 raised the question of "both the constitutionality and the expediency of the law creating this bank," and in 1832 he vetoed a rechartering bill. The question of rechartering immediately became the dominant issue of the following campaign, and Jackson's reëlection was interpreted as a popular endorsement of his bank policy. In September, 1833, Secretary Taney issued an order for effecting a removal of public deposits to selected State banks, and this executive procedure was given legislative endorsement in an act of June 23, 1836, specifically providing for deposit of public moneys in State banks. At the expiration of its National charter, the Bank of the United States continued to operate for some years under a charter obtained from the Legislature of Pennsylvania.

Difficulties similar to those experienced in the earlier period in which public funds had been entrusted to selected State banks were now again experienced by the Treasury. The State banks had greatly expanded their note circulations and were heavily involved in public land speculations. The collapse came in 1837, and in May of that year banks in all sections of the country suspended specie payments.

Banking in the years between 1846 and 1863, when the national system was initiated, was under the laws of the several States.

Distinguishing features of the national banking system, as set up in the acts of 1863 and 1864, are found in the provisions for national incorporation of banks and for the issue of a bond-secured bank currency; in specific requirements as regards reserves to be held against deposit liabilities; and in provision for general supervision under direction of a Treasury official, the Comptroller of the Currency.

It was provided that banks taking out national charters should be permitted to issue notes secured by United States bonds deposited with the Secretary of the Treasury up to 100 per cent of the market value of the bonds not exceeding par. On March 2, 1865, an act was passed imposing a prohibitory tax of 10 per cent on State bank notes issued after July, 1866. This act by virtually restricting the note issue privilege to national banks was effective in inducing State banks to take out national charters, and the number of national banks increased from 638 in January, 1865, to 1,513, in the following October. Under the national banking system currency issues were safe but rigidly inelastic. After the panic of 1907 an act was passed

authorizing banks to issue emergency notes secured by commercial paper and other securities, but the notes were subject to taxation at a rate sufficiently high to make them unprofitable except as temporary emergency issues.

The Federal Reserve Act of December, 1913, effected a thoroughgoing revision of our banking system. It required all national banks to become members of the Federal Reserve System on penalty of surrendering their national charters. State banks are permitted to join, retaining all their State charter privileges in so far as these are not inconsistent with the provisions of the Federal Reserve Act.

44. THE FEDERAL RESERVE SYSTEM[1]

By D. R. Crissinger

Governor Federal Reserve Board

The act of December 23, 1913, establishing the Federal Reserve System was the legislative outcome of agitation originating more immediately in the disastrous experiences of the panic of 1907. These experiences were in large measure attributed to recognized defects in our national banking system. More particularly they were attributed to the working of those provisions of the national bank act which rendered our bank-note currency and the leading capacity of banks highly inelastic.

Proposals to establish a central banking institution were brought forward, but this relatively simple solution was one which did not sufficiently take into account the nature of our political institutions, the great extent of our territory, the popular distrust of anything in the nature of a powerful and highly centralized agency, or our long established tradition of free banking. Nevertheless, some degree of Federal control was clearly required to effect that improvement in our banking system which experience had demonstrated to be absolutely essential.

As specifically set forth in its title, the purposes of the Federal Reserve Act were "to provide for the estabishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes." Consistently with these purposes the act provides for centralization of banking reserves in 12 regional banks, for general supervision

[1] Reprinted from the *Congressional Digest,* March, 1926, by permission of the editor.

by a Federal board, for extension of reserve bank credit to member banks by a carefully safeguarded process of rediscounting for the issue of Federal reserve notes secured by commercial paper, for the exercise of intra and inter district clearing house functions by the reserve banks, and for the utilization of these banks as fiscal agencies of the Government.

Under the provisions of the act the country was divided into 12 Federal reserve districts, "apportioned with due regard to the convenience and customary course of business." National banks were required to subscribe an amount equal to 6 per cent of their capital and surplus to the capital of the Federal reserve bank of their district. Of these subscriptions one-half was required to be paid in, the remaining half being subject to call in the discretion of the Federal Reserve Board. Net earnings of the reserve banks in excess of cumulative 6 per cent dividends on the paid-in capital are appropriated to surplus until the surplus accumulated equals the subscribed capital, and thereafter are appropriated 10 per cent to surplus and 90 per cent in payment of a franchise tax to the Government.

State banks with sufficient capital were permitted to subscribe to reserve bank capital and join the system, retaining their State charter privileges in so far as these are not inconsistent with the provisions of the act.

Each reserve bank is managed by a board of nine directors, of whom three are appointed by the Federal Reserve Board, and six are elected by the member banks of the district. One of the appointed members is designated by the Federal Reserve Board as Chairman of the board of directors, and as Federal reserve agent. He acts as official representative of and makes regular reports to the Federal Reserve Board. The executive head of a reserve bank is known as the Governor.

Any reserve bank may be permitted or required by the Federal Reserve Board to establish branches, and 23 such branches have been established.

The Federal Reserve Board consists of eight members, including the Secretary of the Treasury and the Comptroller of the Currency, *ex officio,* and six members—not more than one from any one district—appointed by the President with "due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country." The President designates one of the appointed members as Governor and one as Vice Governor of the board.

There is also provision for a Federal Advisory Council, consisting of one member elected by the board of directors in each district.

This council, which meets in Washington at least four times each year, confers with the Federal Reserve Board and makes oral or written recommendations. Twice a year the Federal Reserve Board invites the Governors of the reserve banks to Washington for conference, and once a year invites, also, the Federal reserve agents, and on occasion, some of the directors.

Reserve banks are authorized to discount for member banks notes, drafts and bills of exchange of not more than 90-days maturity, or in the case of agricultural or live-stock paper, of not more than nine-months maturity. A reserve bank may loan to its member banks on their promissory notes, secured by eligible paper or United States securities, or War Finance Corporation bonds, for periods not exceeding 15 days. Rates charged by the reserve banks in these operations are subject to review and determination of the Federal Reserve Board. Reserve banks may engage in open market operations, buying and selling cable transfers, bankers' acceptances, and bills of exchange; they may deal in gold coin or bullion, buy and sell United States securities, and certain short-term securities issued by States, counties, and municipalities. Each reserve bank is required to act as fiscal agent of the Government.

Federal reserve notes are issued in the discretion of the Federal Reserve Board on collateral security of eligible paper, or gold, or gold certificates deposited with the Federal Reserve Agent. Against its notes in circulation each reserve bank must maintain a gold reserve of not less than 40 per cent, and it must maintain on deposit in the United States Treasury a redemption fund in gold which is counted as part of its 40 per cent reserve. Federal reserve notes are Government obligations, and a paramount lien on all the assets of the issuing bank. Under these arrangements the volume of notes in circulation is kept constantly adjusted to the current currency needs of agriculture, industry, and commerce.

Member banks located in central reserve cities (New York and Chicago) are required to maintain reserve balances with their reserve bank of not less than 13 per cent of their demand net deposits; banks in reserve cities must maintain balances of not less than 10, and banks outside such cities, of not less than 7 per cent of their demand deposits. Against time deposit balances of not less than 3 per cent are required of all member banks. Only its deposit balances in the reserve bank may be counted as reserve by a member bank. The reserve bank itself must maintain a reserve in lawful money of at least 35 per cent against its deposit liabilities.

Each Federal reserve bank functions as a clearing agency for its member banks. Checks forwarded for collection to the reserve bank

by its member banks are credited to the member bank's reserve balance, and inter-district clearings and collections, and transfers of funds for the Government are effected through a gold settlement fund maintained by each reserve bank with the Federal Reserve Board in Washington.

It will be apparent from the foregoing account that the Federal reserve banks are primarily bankers' banks, owned and controlled by member banks, and operating under the general supervision of the Federal Reserve Board.

Approximately one-third of the banks in the country—some 9,500 in a total of 30,000 banks—are members of the Federal Reserve System, and these member banks control two-thirds of the banking resources of the country.

Beard, (4th Ed.), 363–381.
Kimball, *National Government,* pp. 445–479.
Ogg and Ray, (2nd Ed.), pp. 452–486.

XI

COMMERCE

The constitutional provision that Congress "shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes" has contributed to the expansion of the power of the national government more than any other clause of that document. This clause has met the conditions of the canal, the railroad, the aeroplane, the steamboat, the corporation, the trust, and the modern industrial establishment, and has failed only in relation to child labor and insurance.

Under its power to regulate foreign commerce Congress has passed laws in regard to embargoes, tonnage duties, navigation, the merchant marine, foreign trade, and immigration. Its relation to business is indicated by the enumeration.

Justice Marshall, in the case of Gibbons *vs.* Ogden, defined interstate commerce and this definition has been translated into a myriad of legislative acts and judicial decisions which have resulted in the control of transportation, the "busting" of trusts, and the elimination of unfair competition. At least two of the independent agencies created under this provision, the Federal Trade Commission and the Interstate Commerce Commission, are numbered among the more important parts of the governmental machine. Modern business analyzes carefully their personnel and their policies, and both personnel and policies are subjected to close scrutiny by watchful antagonists of presidents and administrations.

The clause was inserted to eliminate a glaring defect of the Articles of Confederation, and subsequent acts and judicial decisions have made this national power one of great significance.

45. THE INTERSTATE COMMERCE COMMISSION AND ITS WORK

Established Under the Interstate Commerce Act of 1887 [1]

Present Members

Balthasar H. Meyer, Chairman

Charles C. McChord	Clyde B. Aitchison	Johnston B. Campbell
Henry C. Hall	Joseph B. Eastman	Ernest I. Lewis
Frank McManamy	Mark W. Potter	Frederick I. Cox
	John J. Esch	

[1] Reprinted from the *Congressional Digest,* October, 1923, by permission of the editor.

The Interstate Commerce Commission, an independent establishment of the national government, is an administrative body with quasi-legislative and judicial powers, whose general function is the administration and enforcement of the provisions of the "Interstate Commerce Act" of 1887, as amended by subsequent legislation.

The history of the Interstate Commerce Commission indicates that there were three main currents of legislation in consequence of which activities devolved upon the commission. Under the primary legislation the commission's central function is the establishment and maintenance of reasonable and just transportation facilities, rates, classifications, regulations, and practices. Under the safety acts the function of the commission is the provision for safety of employees, passengers, and property. Finally, the Transportation Act of 1920, renders the commission to a large extent a board of directors of the carriers which are conceived, for certain purposes of regulation, as one great combined system.

MAINTENANCE OF RATES, CLASSIFICATIONS, PRACTICES, ETC.

The Interstate Commerce Act prescribes certain standards for the carriers under national jurisdiction and lays down certain prohibitions in the fixing of rates, in providing facilities for transportation of persons and property, in the transmission of intelligence, in classification of property, messages, etc. The law provides:

1. Every carrier subject to the act is required "to provide and furnish" transportation upon reasonable request therefor, to furnish car service and to "establish rules with respect to car service."

2. The carriers must establish through routes, provide facilities for operating them, establish just rates, and make rules for such operation, and provide for divisions of joint rates.

3. All charges made for service rendered in transportation of passengers or property or transmission of intelligence by wire or wireless must be just and reasonable.

4. Just classifications of property for transportation must be established by the carriers as well as reasonable regulations affecting classifications of rates.

5. Carriers must file with the commission and keep for public inspection, schedules showing all the rates, fares, and charges for transportation.

Section 4 of the law renders it unlawful for a carrier to charge greater compensation in the aggregate for transportation over a shorter than for a longer distance, over the same route in the same direction.

Rates originally reduced by carriers to meet water competition may not be raised again without permission of the commission.

Paragraph (3) of Section 6 prohibits carriers from making any change in rates, except after thirty days' notice to the commission and to the public.

POSITIVE DUTIES OF THE COMMISSION

In addition to functioning as the administrative agency for securing compliance of the carriers with the standards and prohibitions described above, the act specifically directs the commission to perform duties necessary for establishment and maintenance of just and reasonable rates, facilities, classifications practices, etc.

Section 15, Paragraph (6), of the act authorizes the commission to determine and prescribe just and reasonable rates, etc., both maximum and minimum, to be charged by carriers when it has found that the rates in effect are in violation of the act.

The commission has also been authorized to modify state rates when they are found to result in preference, prejudice, or discrimination against interstate or foreign commerce, "the law of any state or the decision or order of any state authority to the contrary notwithstanding."

Section 20 renders carriers fully liable to the lawful holder of a bill of lading for any loss, damage, or injury to his property.

ORGANIZATION

The law provides for eleven Commissioners, not more than six from the same political party, appointed by the President with the concurrence of the Senate for seven-year terms at salaries of $12,000 per annum. The commission has authority to employ and fix the compensation of such employees, expert examiners, and such attorneys as it finds necessary. Also to appoint the fifty district inspectors of locomotives, according to the Civil Service Commission's rules.

By the Act of 1917 the commission is authorized to divide its membership into divisions and to assign or refer any of its work, business, or functions, to such a division for action.

The Commissioner senior in service in each division is designated its Chairman. Each division consists of three members, except Divisions 1 and 4, which have four members. The duties of the respective divisions are as follows:

Division 1. The conduct of the work of the Bureau of Valuation, and with matters arising under the safety-appliance acts.

Division 2. The disposition of applications and requests for suspension of rates, the disposition of cases on the special docket, involving awards of reparation for unreasonable rates; the formulation of regulations for the safe transportation of explosives; requests for authority to establish released rates, and matters arising under Section 208 (a) of the Transportation Act.

Division 3. The disposition of formal cases not orally argued and recommendations as to prosecutions for violations of law.

Division 4. Matters which relate, respectively, to the reimbursement of carriers for deficits during government control; the guaranty to carriers during the six months beginning March 1, 1920; new loans to railroads; the issuance of certificates for new construction or abandonment of railroads; the approval of the consolidation of railroad carriers, and the regulation of the issuance of securities of carriers by railroad.

Division 5. Matters arising as to transportation during war upon the direction of the President; also matters respecting the common use of terminals by carriers, concerning physical connection between rail lines and docks.

All the divisions except the last act in monthly rotation to hear argument and determine such cases as are not reserved for the full commission.

THE STAFF

The general administrative and executive officer of the commission is its Secretary.

Thirteen bureaus of the commission, one of which is of a purely institutional character, have several sections in each bureau. These bureaus are: Administration, Formal Cases, Informal Cases, Traffic, Inquiry, Law, Safety, Locomotive Inspection, Service, Finance, Accounts, Statistics, Valuation.

RELATIONS WITH OTHER GOVERNMENT BODIES

The Transportation Act created the Railroad Labor Board. No provision is made in the law for coördination between this board and the commission.

A jurisdictional conflict between the Shipping Board and the commission has emerged from the enactment of Section 19 of the Merchant Marine Act. The commission has appointed a committee to confer with a similar body from the Shipping Board "upon matters of common interest and concern."—Extracts I. G. R.

46. FUNCTIONS OF THE FEDERAL TRADE COMMISSION[1]

By Gregory Hankin

A. HISTORICAL BACKGROUND

The advantages or disadvantages of trusts and monopolies are not the subject of the present discussion. Let us start out with the historical fact that ever since the middle of the nineteenth century there have been numerous combinations in industry, that these organizations have exerted considerable influence on markets and, consequently, on the economic life of the people. Concurrently also arose organizations of people who felt that their interests were injured by these trusts and monopolies. The controversy became a question of political importance, with the result that in 1890 Congress passed the Sherman Anti-Trust Act. Apparently that did not solve the problem. The act provided no administrative facilities for investigating and determining what actually constituted a trust or monopoly within the meaning of the statute; the methods of evading the law were numerous; and in some instances the courts limited its operation.[2] In 1903 Congress created the Bureau of Corporations and authorized it to investigate the conduct of corporations engaged in interstate commerce and make recommendations to Congress for further legislation. It was a purely investigating body; it was not empowered to interfere with the conduct of any

[1] The writer wishes to acknowledge his indebtedness to Col. Huston Thompson, Chairman, and to Mr. O. B. Johnson, Secretary, of the Federal Trade Commission for all the facilities and help they accorded him in this work as well as in his other works on the Federal Trade Commission. Reprinted from the *Illinois Law Quarterly*, April, 1924, by permission of the author and publisher.

[2] Combinations of commission merchants at stockyards by which they refused to deal with non-members were held to be not in violation of the Anti-Trust Act, on the ground that their business is not interstate commerce, Hopkins *v.* United States (1898) 171 U. S. 578, 43 Law. Ed., 290. The same was held with reference to the rules of a live-stock exchange in Anderson *v.* United States 171 U. S. 604, 43 Law. Ed., 300. The same applies to combinations in restraint of trade in manufacturing and production, for that was held to be not interstate commerce. But the most important of the limitations put upon the Anti-Trust Act is known as the "Rule of Reason," in the interpretation of the words "restraint of trade." United States *v.* American Tobacco Co. (1911) 211 U. S. 106, 55 Law. Ed., 663; also Standard Oil Co. *v.* United States (1911) 221 U. S. 1, 55 Law. Ed., 619.

corporation or to institute proceedings against any corporations for unlawful conduct, although it was empowered to render assistance to the Department of Justice.

However, complex social problems cannot be solved by simple legislation, and it is both unwise and dangerous to embrace an intricate social or economic system under a single rule, especially where the object of the legislation is largely dependent on differences of degree. Such is the case with concepts like "competition," "restraint of trade," and the many others involved in anti-trust legislation. The problem of applying the inadequate laws devolved on the courts. Here a number of additional difficulties arose: First, the questions arising under this act require much economic research and analysis. They are not purely legal questions. By the nature of our judicial system, our courts do not have facilities for scientific economic research and such research is indispensible. Second, the law was entirely remedial, and by the time criminal prosecutions could be instituted and conviction had, damage was done. The penalties too were inadequate where the acts had already been accomplished. Some corporations violating the law could well afford to regard the probable punishment as partial cost for the end they sought to accomplish. Third, since the prosecutions were criminal in nature, the law had to be construed in favor of the accused and strictly against the prosecution. Fourth, the economic inclinations of the courts were often opposed to those of the legislature, and hence often limited the operation of the law.

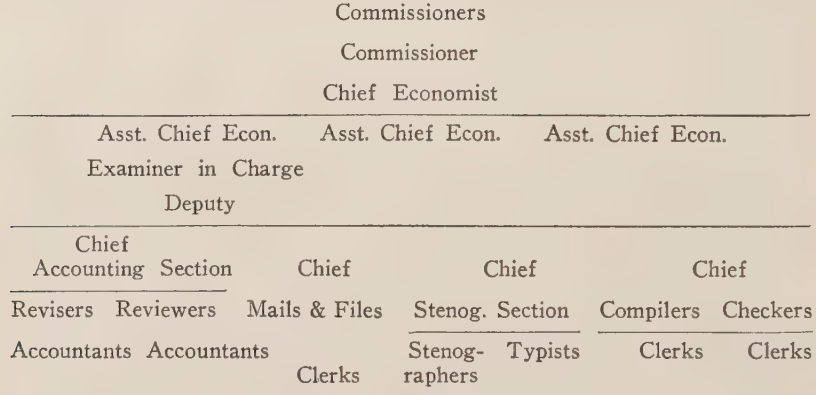
"The conviction became general in America, that the legislation of the past had been largely ineffective. There was general agreement that further legislation was desirable. But there was a clear division as to what its character should be. Many believed that concentration (called by its opponents monopoly) was inevitable and desirable; and these desired that concentration should be recognized by law and regulated. Others believed that concentration was a source of evil; that existing combinations could be disintegrated, if only the judicial machinery were perfected; and that further concentration could be averted by providing additional remedies, and particularly through regulating competition. The latter view prevailed in the sixty-third Congress." [3]

The Federal Trade Commission Act was passed in September, 1914, condemning unfair methods of competition as unlawful and creating an administrative body for the enforcement of the Act.

[3] Federal Trade Commission *v.* Gratz (1920) 253 U. S., 421, 64 Law. Ed. 993.

B. PROCEDURE

The Federal Trade Commission has two main divisions: legal and economic. The economic division is investigative, and is intended to remedy the first of the defects aforementioned. The investigations of this division may be divided into three general classes: (a) those conducted pursuant to a resolution of either house of Congress, (b) those undertaken by the Commission on its own motion, and (c) those conducted under the direction of the President. After a few preliminary steps, the three classes of investigations converge toward the same treatment. The Commissioners direct the Chief Economist to make the given investigation. The latter consults with the Assistant Chief Economists as to the nature and scope of the problem, and after that is determined, the matter is assigned to one of the Assistant Chief Economists and by him to an examiner under whose direction the investigation is conducted.[4] The informa-



tion is collected by means of field investigations, by means of questionnaires, or by means of data taken by accountants from the books and papers of the companies under investigation.

The types of data gathered may also be of interest. Here we find statements regarding costs, profits and investments; statistical data regarding production, sales, stocks, prices, expenses, plants, contracts, etc.; interviews with persons conversant with the industry investigated; copies of correspondence, memoranda, etc.; trade practice information, etc. These are types of data which cannot be obtained except by careful and specialized investigation. When the data are collected, indexed, digested, tabulated, etc., an outline of the

[4] A bird's-eye view of the personnel involved in the investigation may be obtained from the chart:

report is submitted to the Assistant Chief Economist. The report is then drafted and subjected to further study, revised, submitted to the Chief Economist for approval, and when the report is approved, it is transmitted to the Commissioners and then issued to the public in printed or mimeographed form. These investigations are designed to form the basis for future legislation or executive action.

The legal division of the Federal Trade Commission is not a mere prosecuting agency. Most painstaking investigation is made prior to the issuance of a formal complaint. According to the Commission's Rules of Practice, "any person, partnership or corporation may apply to the Commission to institute a proceeding in respect to any violation of law over which the Commission has jurisdiction." Upon the filing of such application, it is referred to the Chief Examiner to determine whether or not the petition should be docketed as an application for complaint. The Chief Examiner may find either (1) that the matter is one which upon its face is not properly addressed to the Commission, or (2) that further facts are necessary to determine whether an application should be docketed, or (3) that the petition presents sufficient facts to warrant the docketing of an application for complaint.

In the first case, the Chief Examiner so informs the petitioner and refers him to his proper forum, if any, and this closes the matter so far as the Commission is concerned. In the second case the Chief Examiner conducts the necessary inquiry, by correspondence, to determine whether or not the petition should be docketed. In the third case the petition is referred by the Chief Examiner to the Docket Section, an administrative unit, where the papers are filed in appropriate jackets, a number given, and indices made.

The application then goes back to the Chief Examiner and is by him assigned to an attorney on his staff for investigation. It is his duty to gather, if possible, sufficient facts, names of witnesses, documentary evidence, to establish a prima facie case. The attorney completes his investigation by the filing of a final report which summarizes the evidence and contains a recommendation either (1) that the application be dismissed, or (2) that a formal complaint issue. The Chief Examiner reviews the attorney's report and either approves or disapproves his recommendation, with such comment as he cares to make. The Chief Examiner then transmits the entire file, through the Docket Section, to the Board of Review. The Board of Review examines the record, writes a report embodying the essential facts, its finding of facts, and a recommendation either (1) for dismissal of the application, or (2) that formal complaint issue. . . .

If the Board recommends a complaint it embodies its theory of the complaint in its report in such detail as to permit a draftsman to draw a complaint. An attorney drafts a complaint from the Board's report exemplifying the Board's theory of law and facts in the light of precedents established by the courts and the Commission.

The case is then assigned and referred to a Commissioner for supervision. Under the rules, the individual Commissioner has a certain number of days within which to examine the record and to report his recommendation to the Commission. The case is presented by the Commissioner in charge to the full Commission in board-meeting, usually accompanied by a memorandum prepared by the Commissioner in charge in which he reviews the record and makes a recommendation (1) for complaint, or (2) for dismissal.

The Commission as a whole may vote to dismiss the application, or to issue a complaint. If it votes the latter, the record is transmitted to the Chief Counsel, through the Docket Section, and assigned by the Chief Counsel to an attorney on his staff who will try the case. The attorney takes the field investigator's report, the report of the Board of Review, the report of the individual Commissioner who submitted the case, and any suggestions which the Commission may communicate; he then studies the complaint drafted by the Board of Review, either approves it or works out proper modifications with the Board of Review, and then the Chief Counsel approves its final form and substance. The complaint then goes with the record through the Docket to the Secretary who serves the complaint upon the parties.

After complaint, the Chief Counsel has charge of the trial of cases. The Chief Examiner thereupon designates an attorney to sit as examiner and act for the Commission in conducting the trial, taking testimony and receiving evidence, etc.

The trial attorney presents evidence to sustain the allegations of the complaint, and the attorney for the respondent presents the defense before the trial examiner. At the conclusion of the taking of testimony and the submission of evidence, the trial examiner prepares a report upon the facts and a suggestion for an order either (1) for dismissal, or (2) that the respondent cease and desist from the practices alleged. The examiner's report is served upon counsel for the Commission and counsel for the respondent, and a copy forwarded to the Commission. Counsel for both sides may either accept the examiner's report or file such exceptions thereto as they please. If they select the latter course, counsel for the Commission and counsel for the respondent prepared their respective briefs, including their ex-

ceptions. The case is then set for final argument before the full Commission at Washington, upon due notice to both sides. The Commission considers the record and concludes either (1) to dismiss its complaint, or (2) to issue its order that the respondent cease and desist from the practices charged in the complaint.

If the Commission decides to issue an order to cease and desist, it either (1) approves the examiner's Report of the Facts, or (2) makes slight modifications in the trial examiner's Report, not requiring reference to the testimony for verification, or (3) the Commission refers the record back to the trial examiner for modification. In the first and second classes of cases, the Secretary of the Commission prepares a final form of findings as to facts and an order to cease and desist. These are approved by the Chief Counsel, served and entered on record. In the third class of cases, the trial examiner considers his report in the light of the Commission's action thereon, the exceptions taken thereto and the arguments presented by the briefs of both sides relating to the exceptions. Then he drafts in due form a set of findings covering all relevant and material questions of fact, and an order to cease and desist which conforms to the charges stated in the complaint, and certifies that he has done so. These drafts with the record are forwarded to the Commission for its approval. If approved by the Commission the findings and order are remitted to the Chief Counsel for his approval; the same is served by the Secretary and entered on record. This concludes the case as far as proceedings before the Federal Trade Commission are concerned.[5]

C. ORDERS ISSUED BY THE COMMISSION

From the time the Federal Trade Commission took over the work of the Bureau of Corporations through December 31st, 1923, the Commission received 3401 complaints. Of these 1959 were dismissed by the Commission; 1107 formal complaints were issued by the Commission, of which the following were dismissed for the reasons stated:

REASON FOR DISMISSAL	No. of Cases
Faulty pleadings	2
Complaint issued against wrong party	1
Practice discontinued	19

[5] For the functions and powers of the Commission see Federal Trade Com. Act 38 U. S. Stat. 717, U. S. Comp. Stat. (1918) 8836 e and f; Clayton Act, 38 U. S. Stat. 730, U. S. Comp. Stat. (1918) 8835 b, c, d, h, and k.

Respondent out of business	29
Public interest insufficient	10
Tendency to restrict competition negligible	1
Practice not within the act	38
Proof insufficient	42
Lack of interstate commerce	23
Court decision in Beech-Nut case	40
Court decision in oil cases	12
Court decision in B. S. Pearsall Butter Co.	10
Court decision in Mennen Co. case	1
Court case in Kinney-Rome Co. case	5
Court decision in New Jersey Asbestos case	1
Disposed of by civil litigation	7

In 590 cases the Commission issued order to cease and desist on the ground that the practices complained of were in violation of the Federal Trade Commission Act or the Clayton Act. It may be interesting to note briefly what are the practices which the Federal Trade Commission found to be unlawful. The statement, however, must not be taken as conclusive, for as an order-issuing, and not as a rule-making body, the Commission confines its decisions to the particular facts under consideration, and accompanies its orders by the words: "Held that such conduct, *under the circumstances set forth,* constituted an unfair method of competition," or "constituted a violation of section —— of the Clayton Act." . . .

As was observed, section 5 of the Federal Trade Commission Act provides that "any party required by such order of the Commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a petition praying that the order of the Commission be set aside." To June 30, 1923, of the 548 orders issued by the Commission, 40 were carried to the circuit court of appeals. The court affirmed the orders of the Commission in 11 cases, and reversed 24 orders; 4 cases are still pending before the court; one petition was withdrawn; 15 cases were carried to the Supreme Court of the United States, which sustained the Commission in 3 cases and overruled their orders in 6 cases. A study of the legal problems involved in the work of the Commission requires an analysis of the questions raised in the decisions of the courts.

47. WHAT HAS THE FEDERAL TRADE COMMISSION ACCOMPLISHED?[1]

By W. H. S. Stevens

INTRODUCTION

Something over ten years having elapsed since the organization of the Federal Trade Commission,[2] the time seems appropriate for a survey of its accomplishments and an attempt to estimate the value of its work. Such a study is particularly desirable because during the past year or two the commission has received much criticism and much condemnation. To err is human; and the commission is no exception to the rule. Yet much of the criticism in question has had no sound basis, but has arisen from the unpopularity of the commission's action, either with some large and influential group or with the business world in general.

By the terms of section 5 of the Federal Trade Commission act, that body was authorized to prevent "unfair methods of competition in commerce" (interstate); and by the terms of the Clayton act it was also specifically authorized to prevent, under certain conditions, price discriminations, exclusive and tying contracts, combination through capital stock acquisition, and interlocking directorates. Stripped of these provisions, the Federal Trade Commission has little power except that of investigation, in which field extensive authority was conferred on the commission by section 6 of that act.[3]

[1] Reprinted from the *American Economic Review,* December, 1925, by permission of the author and the publisher.

[2] The original five commissioners took the oath of office March 16, '15.

[3] Sec. 6. That the commission shall also have power:

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the act to regulate commerce, or any class of them, or any of them respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporation filing such reports of answers in writing. Such reports and

In carrying out the provisions of the laws under which the commission operates, the work has always been organized into two main divisions, legal and economic. In addition, there is an administrative division, an export trade division, and an enemy patent division. The last two are small divisions, one created as a result of the Webb act, April 10, 1918, which imposed certain duties on the commission with respect to the export associations authorized thereby; the other, organized under the Trading with the Enemy act, approved October 6, 1917, primarily to consider applications for license to use enemy patents and the granting of same where deemed advisable in accordance with the general conditions provided by law. This discussion is confined to a consideration of the work of the economic and legal divisions.

answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust acts by any corporations.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

ORGANIZATION OF THE ECONOMIC DIVISION

As organized in 1915–16, the economic work was under the direction of a chief economist, to whom there reported an assistant chief economist and the chief of the division of corporation reports. Almost immediately, however, this organization was changed, and the work placed under the direction of an economic advisory board composed of a chairman and two other members. This system did not function satisfactorily, particularly under the pressure of war work; and in consequence a chief economist was substituted for the economic advisory board and given entire responsibility for the work of the economic division. Three assistant chiefs and a chief accountant were created, all reporting to the chief economist. This form of organization has been maintained down to the present, except that there are at this writing only two assistant chief economists, the place of one who resigned never having been filled. . . .

CHANGES IN PUBLICITY POLICY—ECONOMIC

In the past the publicity features of the work of the economic division may be said to have been divided into two classes: (1) publicity of facts relating to antitrust law violations and (2) publicity of facts of general public interest and concern not related to such violations. A perusal of the foregoing discussion is sufficient to convince an impartial reader that under the latter head the economic division has adduced numerous valuable and interesting economic facts.

In the 1925–1926 Appropriation act, however, the following clause was inserted: "*Provided,* that no part of this sum shall be expended for investigations requested by either House of Congress except those requested by concurrent resolution of Congress, but this limitation shall not apply to investigations and reports in connection with alleged violations of the antitrust acts by any corporation."[4]

To judge from hearings before the House Appropriations Committee in this and immediately preceding years, as well as various other proposed reductions in and limitations of appropriations, the motive of this rider was economy. Some persons undoubtedly believed that the rider was designed to reduce economic investigation and consequent publicity of economic facts.[5] Whatever the mo-

[4] Editor's note. This clause was struck out of the appropriation bill for 1926–27.

[5] In connection with the economy argument it is worth noting that the commission's appropriation has been in recent years $1,000,000 in round figures,

tive of the rider the tendency would appear to be in these directions, since it is always difficult to secure a concurrent resolution such as was expressly provided for in this legislation. The rider, it would seem, should be regarded as indicating a change in the attitude of Congress toward economic inquiries and publicity of the facts relating thereto. This view is supported by the fact that prior to the adoption of this rider the established policy of the commission, and of the Bureau of Corporations before it, had been to conduct all inquiries requested by either House of Congress, irrespective of whether related to violations of the antitrust acts or not.[6]

The immediate result of the rider under discussion was the stoppage on July 1, 1925, of all work on the inquiry into wealth and income and the inquiry into flour and bread, both being prosecuted under Senate resolutions. With regard to the former, no question could be raised as to the inability of the commission to continue work under the terms of the appropriation rider, since the resolution made no reference whatsoever to antitrust law violations. The case was not so clear, however, with the bread inquiry ordered by a Senate resolution dated February 16, 1924. This resolution read as follows:

> Resolved, That the Federal Trade Commission be, and it is hereby, directed to investigate the production, distribution, transportation, and sale of flour and bread, including by-products, and report its findings in full to the Senate, showing the costs, prices, and profits at each stage of the process of production and distribution, from the time the wheat leaves the farm until the bread is delivered to the consumer; the extent and methods of price fixing, price maintenance, and price discrimination; the developments in the direction of monopoly and concentration of control in the milling and baking industries, and all evidence indicating the existence of agreements, conspiracies, or combinations in restraint of trade.[7]

The discontinuance of this inquiry, therefore, raises the question whether it is one forbidden by the terms of the appropriation rider

while the expenditures of the economic division have averaged something over $250,000. The Bureau of Corporations expended annually in the last few years of its existence over $200,000. Except, therefore, for its pro rata share of commission administrative expense, the expenses of the economic division are not greatly in excess of those of the old bureau.

[6] Cf. Commission reports on *Shoe and Leather Costs and Prices; Wheat Flour Milling Industry; Wealth and Income;* and bureau report on *Tobacco Prices;* also the *Fertilizer Industry* report begun by the bureau and completed by the commission. None of these resolutions made any reference to antitrust law violation.

[7] The resolution as introduced contained a preamble setting out certain other charges; but this was stricken out on the floor.

or whether it is one under the terms of section 6 (d) of the Federal Trade act. This question is, moreover, an interesting one in view of the fact that, as a matter of general statutory construction, it is probably mandatory upon the commission to conduct inquiries under section 6 (d) upon the direction of either House of Congress.[8]

The power of the commission now contained in section 6 (d) appeared originally in section 10 of the House bill separate and distinct from other investigatory powers contained in other sections of that bill. A clear line of distinction, therefore, was drawn in the first draft of the House bill between investigations which it was mandatory for the commission to conduct and other presumably non-mandatory investigative powers.[9] Concerning section 10, House Report No. 533 (62 Cong. 2 Sess., p. 5) from the Committee on Interstate and Foreign Commerce to accompany the bill said: "The commission will also be *required* under section 10 of the bill by the direction of the President, the Attorney General, or either House of Congress, to investigate and report the facts *relative* to any alleged violation of the antitrust acts."

The statement of the managers on the part of the House in the conference report reads as follows: "The commission is required to make the investigations *relating* to *alleged* violations of the anti-trust acts as provided in section 10 of the House bill." [10]

The phraseology of the interpretation of the conference committee is "relating to," corresponding to the language of the act, while the wording of the exception of the proviso in the appropriation rider is "in connection with."

It should be noted that, presumably because of the proviso of the appropriation act under consideration, the commission has failed to begin either the open price association inquiry or the investigation into the coöperatives, both under Senate resolutions passed prior to the appropriation rider. With regard to both of these inquiries it may be observed that allegations of violations of the anti-trust acts are less numerous and specific than in the case of the bread resolution.

[8] Editor's note. Opinion of Attorney-General dated Oct. 24, 1925, arrived at the conclusion that the commission could conduct open inquiries into flour and bread and also into the Coöperative Associations and the Open Price Associations.

[9] For example, the House Bill transferred all the powers of the Bureau of Corporations to the Commission in section 3.

[10] This section read "That upon the direction of the President, the Attorney General, or either House of Congress and the commission shall investigate and report the facts relating to any alleged violations of the anti-trust acts by any corporations. . . ."

CHANGES IN PUBLICITY POLICY—LEGAL

In March, 1925, the commission, with Commissioners Thompson and Nugent dissenting, adopted certain changes in procedure. The principal points involved in these changes were:

1. That the commission will not take jurisdiction in cases where the alleged violation of law is a purely private controversy redressable in the courts, unless the practices in question substantially tend to suppress competition as affecting the public.

2. The phrase "in the interest of the public" plainly gives the commission a judicial discretion in the issuance of complaints to be exercised in the particular case.

3. Where the business itself is fraudulent, it may well be considered that the protection of the public demands the regular procedure of complaint and order.

4. All cases shall be settled by stipulation except where the public interest demands otherwise as set forth above.

5. In all cases handled by the Board of Review, before it recommends the issuance of a complaint, the respondent shall be given a hearing before the board to show cause why a complaint should not issue. The hearing shall be informal and not involve the taking of testimony, and the respondent shall be allowed to make or submit such statement of facts or law as he desires, the extent and control of the hearing resting with the board.

6. Whereas under the old rule a notice of hearing is given after complaint is issued,[11] a majority of the commission believes that the issuance of a complaint is often of damage to the respondent if it be found that he is not guilty of the practices charged. Therefore, the respondent should be afforded an opportunity to show reasons why a complaint should not be issued. The majority also believes that such hearings will have the advantage of disclosing facts[12] from which the commission will be better able to determine whether causes exist for the issuance of a complaint.[13]

The commission also adopted the following rule (two commissioners dissenting):

From and after this date, in the settlement of any matter by stipulation before complaint is issued, no statement in reference thereto shall be made by the Commission for publication. After a complaint is issued

[11] As required by the organic act.

[12] Compare with the above, statement in paragraph 5 that no testimony will be taken.

[13] Official Statement, March 17, 1925.

no statement in regard to the case shall be made by the Commission for publication until after the final determination of the case.

After a complaint has been issued and the answer of the respondent has been filed, or in case the respondent fails to file an answer by the rules provided, the papers in the case shall be open to the public for inspection. . . .

A rule providing for similar settlements by stipulation had been adopted February 7, 1923, and was in effect until October 17 of that year when it was rescinded by a 3 to 1 vote. The rule provided that in certain cases the commission would not issue complaints where the respondent

prefers to admit the facts, assuming the charge to be true, and will abandon the use of the practice, and will state the facts and the abandonment in writing with consent that in case of a resumption . . . the Commission may issue complaint on the statement of facts and that it may be used in evidence against him on trial.

Concerning the new publicity rule the majority of the commission says:

Parties whose practices the Commission deems unlawful and who are willing to correct them should be encouraged to do so. Publication of their agreement to do so however does not encourage them. It rather deters them, as many respondents, if their agreement is to be given publicity, to be used by their rivals, will rather contest the case.

The minority (two commissioners) dissented from the first paragraph of the above rule. With regard to this paragraph the dissent says:

In other words, nothing shall be made public concerning the dismissal of applications for complaint on stipulation . . .

It appears to me . . . that it is intended that no publicity shall at any time be given out by anybody concerning such stipulations, and that they shall not become public documents or open to the inspection of any person, including the business men who lodged complaints with the Commission against the respondents who enter into said stipulations. . . . I do not believe that their stipulations should be regarded as confidential or withheld from public view.

With regard to the second paragraph of the rules the dissent further says:

I am of the opinion that when a complaint is formally issued it becomes a public document and should be open to the inspection of representa-

tives of the press and the public generally. It should not be withheld from such inspection until answer is filed, which, under the Rules of Practice, is thirty days after service of complaint, and which time is frequently extended on request of respondent.[14]

The foregoing outline scarcely calls for a conclusion. The record speaks for itself. The Commission, and the Bureau of Corporations before it, have stood firmly for the principle of competition and for full publicity of the facts as an aid in the enforcement of that principle, though what the effect of the recent changes in policy will be, or what the future policy may be, no one can foretell. Taking the record as a whole, however, can either the advocate or the opponent of the competitive system honestly deny that in the last ten years the commission has fought a good fight in defense of that system?

48. NATIONAL ORIGINS: OUR NEW IMMIGRATION FORMULA[1]

By George Wheeler Hinman, Jr.

When the United States first undertook to curtail the flow of immigration, the problem of finding a reasonable formula upon which to base the fair distribution of quotas among the various nationalities affected immediately presented itself. The problem was a most troublesome one, complicated by political considerations at home and by diplomatic difficulties abroad.

Assuming the actual curtailment of immigration to be desirable, there still remained to be passed upon several important matters. Nationally speaking, the people of the United States were entitled to first consideration. Hence, it was essential that any basis of restriction should be one which would conserve their interests. There was, in addition, the desire to afford fair treatment to the peoples of nations, hundreds of thousands of whom had left their home lands to begin their lives again in the New World. Those seeking asylum from political or religious persecution had traditionally found in the United States a haven of refuge.

EMERGENCY LAW OF 1921

The first actual move to curtail immigration numerically was the emergency quota law of May 19, 1921, restricting the admission of

[14] Press Releases, April 30 and May 18, 1925.

[1] Reprinted from the *American Review of Reviews*, September, 1924, by permission of the author and publisher.

aliens in any year to 3 per cent. of the number of foreign-born persons of each nationality residing in the United States as shown by the census of 1910. In other words, there being approximately 1,401,900 persons of Italian birth resident in the United States according to the census of 1910, Italy was entitled to send 3 per cent. of that figure, or 42,057 immigrants, to the United States each year.

It is difficult to justify this formula for restriction upon any basis save that of sheer expediency. There is no particular reason why the number of foreign-born of any one nationality should determine how many more that nation might send to American shores. The argument that, because so many had come in recent years, a proportionate number should be admitted in future years, is too far-fetched to be worthy of serious consideration. The history of American immigration is a story of successive waves from various sections of the Old World.

EARLY PREDOMINANCE OF NORTHERN EUROPEAN STOCKS

During the first two centuries and a half following the discovery of America, only 80,000 immigrants entered the area which is now part of the United States. At the close of these 250 years, these immigrants had grown by natural processes until the population of the area approximated 1,000,000 persons. Half a century later, the first census, that of 1790, showed the population of the United States to be almost 4,000,000, practically all of whom were descendants of the original 80,000. Excepting a small sprinkling of descendants of immigrants from France, Spain, Holland, and the Rhenish provinces of Germany, the population of 1790 was British and Irish.

The first American immigration law was enacted in 1820. No official record of immigration was kept by the national government prior to that date. From the best available sources, however, it has been estimated that approximately 300,000 immigrants entered the United States between 1783, the date of the Treaty with Great Britain acknowledging American independence, and 1820. Practically every one of the 300,000 came from the nations of northern and western Europe.

In all, there have been five great waves of immigration in American history. The number of immigrants entering the United States each year did not pass the 100,000 mark until 1842, when the total reached 104,565. The immigration wave then rose steadily until it reached its crest of 427,833 in 1854. This first wave was chiefly British in origin, although political disturbances in Germany drove a large number from that area of Europe to the United States.

Almost all the immigrants came from the nations of northern and western Europe.

RISE OF SOUTHERN AND EASTERN EUROPE AS IMMIGRATION FACTORS

After 1854, the tide receded, but a second wave began sweeping in during the Civil War and rose to a crest of 459,803 in 1873. This wave, too, was mainly British and German, plus a touch of Scandinavian. For the first time, moreover, there was a noticeable trace of immigrants from southern and eastern Europe. Numerically, they were negligible, crossing the 10,000 mark for the first time in 1871. The nations of northern and western Europe were still furnishing the great bulk of immigration.

The third wave began in 1880 and swept quickly to a high mark of 788,992 in 1882. Secondary crests in the same general movement were reached in 1888 and 1892. Although the immigrants of northern and western Europe still dominated, there was a most significant and insistent increase in the flow from the southern and eastern nations. In 1882, they were 11 per cent. of the total, in 1888, 26 per cent. and in 1892, 47 per cent. For the first time, Italy, Russia, Poland and Austria-Hungary were furnishing a considerable proportion of the annual immigration. The influx from Russia and Poland brought many immigrants of the Hebrew race.

Although the third wave definitely receded after 1892, the immigration from southern and eastern Europe continued to occupy its position of prominence. Finally, in 1896, with a percentage of 57 of the total immigration, it passed numerically the influx from the nations of northern and western Europe. From that time until the operation of the quota law of 1921, except for the World War years, the nations of southern and eastern Europe continued to furnish more than half, and in some years more than three-fourths, the total.

In the fourth immigration wave, with the record crest of 1,285,349 in 1907 and secondary crests in 1910 and 1914, the few immigrants from northern and western Europe were completely submerged in the flood from Italy, Austria-Hungary, and Russia. Of the record influx in 1907, 979,661, or more than three-fourths, came from the nations of southern and eastern Europe. For each succeeding year until the outbreak of the World War called a halt, the immigration from these nations exceeded two-thirds of the total. In 1914, it again crossed the three-fourths mark in a total immigration of 1,218,480, only a few thousand below the record figure of 1907.

From all indications only the declarations of war in August, 1914, prevented the year 1915 from setting a new record.

The World War checked the flow of immigration from Europe, which fell from above the million mark in 1914 to less than 25,000 in 1919, or only 18 per cent. of the total for that year. The year 1920, however, started the fifth wave from Europe. The total for the year was 430,001, of which two-fifths came from southern and eastern Europe, one-fifth from northern and western Europe, and the remaining two-fifths principally from other countries of North and South America. The wave continued to rise, reaching 805,228 in 1921. Of this total, more than two-thirds came from southern and eastern Europe. Then the emergency quota law of May, 1921, called a halt.

EMERGENCY QUOTA WORKED AGAINST NORTHERN NATIONALITIES

There was no denying that this emergency act operated in favor of those nationalities which of later years had furnished the bulk of American immigration. For fourteen years prior to the census of 1910, the nationalities of southern and eastern Europe had supplied between one-half and three-fourths of American immigrants. With the law of 1921 basing immigration quotas upon the number of foreign-born of each nationality residing within the United States as shown by the census of 1910, these later arrivals were bound to count heavily against the nations which had sent their immigrants to American shores in the earlier years. So it came about quite naturally that those nations in which had originated nearly four-fifths of the white population of the United States were assigned barely one-half the total immigration quota.

General recognition was given the fact that the law of 1921 was only a makeshift measure designed to meet an emergency. There still remained unsolved the problem of working out a formula for the curtailment of immigration which would serve the interests of the American people and at the same time do justice to the peoples of other nations. In itself, the problem was sufficiently difficult, but this difficulty was greatly aggravated by national and racial controversies. The original sources of American immigration were the nations of northern and western Europe. The newer sources were the nations of southern and eastern Europe. This fact gave rise to the most involved disputes over the relative merits of races and nationalities. Physical, mental and moral characteristics were debated with some bitterness. Records of antiquity were ransacked by eager

scholars to prove this or that doctrine of racial superiority or to disprove a doctrine advanced by somebody else. Much was written, and more was said; and but little of either had any real bearing upon the true issue involved in the search for a formula which would justly curtail American immigration.

Through all the storm of national and racial controversy, the search for an American immigration formula went painstakingly on. The crisis of 1921, with 5,000,000 unemployed in the United States and immigrants entering at the rate of almost 1,000,000 a year, crystallized the belief that the time had come to check the unlimited flow of aliens from abroad. The law of 1921, while it met the emergency, failed to provide a permanently satisfactory means for immigration control. There could be no justification for basing alien quotas on foreign-born inhabitants of the United States and at the same time utterly ignoring the native-born. There was, too, a growing feeling that the law of 1921 admitted an excessive number of immigrants.

IMMIGRATION FROM LEADING SOURCES, AS AFFECTED BY RESTRICTION LAWS

	Year prior to Restriction—1921	Restrictive Law of 1921		Restrictive Law of 1924	
		Quota	Admitted 1922	Quota 1925–27	Quota from July 1, 1927
Austria	4,947	7,451	4,797	785	1,842
Czecho-slovakia	40,884	14,282	14,248	3,073	1,319
France	9,552	5,729	4,343	3,954	2,763
Germany	6,803	68,059	19,053	51,227	22,017
Greece	28,502	3,294	3,447	100	536
Italy	222,260	42,057	42,149	3,845	5,877
Jugoslavia	23,536	6,426	6,644	671	601
Poland	95,089	25,827	26,129	5,982	4,509
Russia	6,398	34,284	28,908	2,248	4,002
Sweden	9,171	20,042	8,766	9,561	3,706
Turkey	18,126	656	1,096	100	114
United Kingdom	79,577	77,342	42,670	62,574	91,110

All figures are for fiscal years ending June 30. The last column is based upon estimates furnished to the Senate; other figures are from the Bureau of Immigration.

The 1921 law restricted immigration to 3 per cent. of foreign-born persons of each nationality resident here in 1910.

The 1924 law provides that for three years immigration will be restricted to 2 per cent. based on the census of 1890, and that after June 30, 1927, total immigration from all countries will be limited to 150,000 based upon national origins of white inhabitants as shown by the census of 1920.

RECOGNIZING NATIVE-BORN OF FOREIGN ORIGIN

All efforts were concentrated upon the task of reaching a solution which, while curtailing the flow of immigration, would at the same time recognize the claims of the native-born as well as those of the foreign-born residing within the United States. In other words, the purpose was to grant recognition to the descendants of those immigrants who had come to the United States in the earlier years and so no longer figured prominently in the compilations of the foreign-born.

The census of 1920 indicated that, of the white population of the United States, approximately 85 per cent. had originated in northern and western Europe and 15 per cent. in southern and eastern Europe. This was in marked contrast to the European immigration quotas of 1921, which, based upon the foreign-born as shown by the census of 1910, gave 55 per cent. to northern and western and 45 per cent. to southern and eastern Europe. In brief, if the origin of the native-born as well as of the foreign-born were to be considered, the quota of southern and eastern Europe would have to be divided by three, and that of northern and western Europe increased by nearly one-half. Any such change, so far as southern and eastern Europe was concerned, would be made more drastic as the total of all quotas was reduced. And yet, assuming that immigration should be curtailed on a basis of even-handed justice to all those who resided within the United States, it was hard to challenge the fairness of a principle which sought to recognize the rights of both the native and the foreign-born.

So the demand grew for the preparation of an immigration formula based upon the national origins of the American people as shown by the best available records, the census of 1920. There were numerous obstacles to the meeting of that demand. It would be no simple task to determine even with approximate accuracy the national origins of 95,000,000 persons, the white population of the United States. It was comparatively easy to estimate that approximately 85 per cent. of that white population had come from the countries of northern and western Europe, but it was another matter to distribute that 85 per cent. upon the face of the changing map of the

Old World. And, as for the 15 per cent. from southern and eastern Europe, the task was just that much more difficult.

Enemies of the principle assailed the idea of a national origins formula as hopelessly unworkable. It was unthinkable, they argued, that any calculator could distribute the quotas with any degree of accuracy. So strong was the opposition that many supporters of the national origins idea advocated the achievement of approximately the same general result by the building of quotas upon the basis of the foreign-born as shown by the census of 1890. This, of course, was a purely arbitrary method designed to restore the balance between the nations of northern and western Europe on the one hand and those of southern and eastern Europe on the other. Meantime, the opponents of the national origins idea were fighting bitterly to retain the census of 1910 as the basis of calculations.

ALIENS ADMITTED
(Years ending June 30)

1910 1,041,570	1915 326,700	1920 430,001
1911 878,587	1916 298,826	1921 805,228
1912 838,172	1917 295,403	1922 309,556
1913 1,197,892	1918 110,618	1923 522,919
1914 1,218,480	1919 141,132	1924 879,300

The table has been spaced to show immigration before, during, and after the war, and also the temporary effect of the restrictive law which became operative in the fiscal year 1922.

A BASIS FOUND IN "NATIONAL ORIGINS"

The outcome of the struggle was a complete victory for both the national origins formula and the census of 1890, the latter as a stop-gap to control during the years prior to July 1, 1927, when the former becomes operative. During each of the years 1925, 1926, and 1927, quotas are to be assigned on the basis of 2 per cent. of the foreign-born of the various nationalities as shown by the census of 1890. The total of these quotas will approximate 162,000 as against 358,000 under the emergency quota law of 1921. During those same three years, the Secretary of State, the Secretary of Commerce, and the Secretary of Labor, jointly, are to work out a plan for admitting to the United States annually 150,000 immigrants with quotas distributed upon the basis of the national origins of the white inhabitants of the United States as shown by the census of 1920.

For example, approximately three-fifths of the white population of the United States originated in Great Britain and Ireland. Accordingly, the annual quota for Great Britain and Ireland for 1928—the governmental fiscal and statistical year ends on June 30 of the calendar year—will approximate three-fifths of 150,000 or 90,000 immigrants. There is a saving clause under which no national quota for admissible immigrants may be less than 100. On the strict national origins basis, for instance, the Egyptian quota would be only three. The quota restriction does not apply to Canada, Newfoundland, Mexico, Cuba, Haiti, the Dominican Republic, and the independent nations of Central and South America. In accordance with the traditional spirit of Pan-Americanism, there is no restriction upon these, if they meet the general requirements. On the other hand, no quotas are given those nationalities ineligible to American citizenship.

The national origins formula works a complete change in the distribution of immigration quotas. Of the total white population of the United States in 1910, approximately 12,000,000 were of foreign birth. Under the quota law of 1921, immigrants were admitted in quotas distributed among the nations in accordance with the origins of these 12,000,000. The national origins formula, however, takes into account not only these foreign-born, but also the native-born; and the immigration quotas are distributed in accordance with the origins of all the 95,000,000 white residents of the United States. In a typical State on the Atlantic seaboard, for instance, 27 per cent. of the population is of foreign birth. Under the law of 1921, the remaining 73 per cent., the native-born, had no voice in determining who should be admitted to the United States, for quotas were apportioned solely on the basis of the 27 per cent. minority. Under the national origins formula, the entire 100 per cent. receive equal consideration within the total of authorized immigration.

SELECTION AT THE SOURCE

In addition to establishing a new basis for immigration restriction, the Act of May, 1924, also provides for regulating admissions by a system of immigration visas administered by the American consular service abroad. The new system goes as far as national sovereignty will permit in selecting American immigration at the source. Before any immigrant sails for the United States, he receives from the local American consul an immigration visa, to obtain which he must answer certain questions bearing upon his admissibility. Un-

less his national quota is unfilled and unless he appears otherwise qualified for admission to the United States, he is denied the visa. In past years, tens of thousands of persons have reached American ports only to be denied admission, usually for reasons that could have been ascertained in their native lands. The system of immigration visas operates to reject the inadmissible alien before he leaves his native land.

HOW THE NEW LAW WILL WORK

A few outstanding cases will suffice to show drastic effect of the application of the national origins idea to American immigration. Under the emergency law of 1921, the Italian quota was 42,057. Under the national origins formula, it will approximate 5,800, less than one-seventh of the former quota, and during the three years under the census of 1890 it will be 3,845, less than one-tenth. Czechoslovakia drops from 14,357 under the law of 1921 to 3,073 under the census of 1890, and again to about 1,300 under the national origins formula. Russia was allowed 24,405 by the law of 1921. She will have only 2,248 each year under the census of 1890 and about 4,000 under the national origins formula. Poland falls from 30,979 to 5,982 under the census of 1890 and finally to approximately 4,500 on the basis of national origins.

The case of Great Britain and Ireland presents the other side of the picture. Their quota under the law of 1921 was 77,342. It is cut to 62,574 during each of the three years on the basis of the census of 1890, but the national origins formula is expected to raise it above the 90,000 mark. When it is recalled that about 45,000,000 of the American people today are descendants of Revolutionary War stock, the reason for this increase is not difficult to understand.

Next to Great Britain and Ireland comes Germany. The German quota under the law of 1921 was 67,607. It drops to 51,227 under the census of 1890, and then is cut to about 22,000 by the national origins formula. Only the British-Irish and the German annual quotas will exceed the 6,000 mark under the national origins formula. Together, they will form about three-fourths of the 150,000 immigration allowance granted all quota nationalities. Under the law of 1921, they composed barely two-fifths of the 358,000 total.

A NATIONAL IMMIGRATION POLICY OUTLINED

Although the cases of individual nations are of interest, the real importance of the national origins formula lies in its significance as

a definite phase in the development of an American immigration policy. The adoption of the formula represents the triumph of two premises. The major premise is that the time has come for the United States to erect a barrier against the flow of immigration from foreign lands. The minor premise is that the barrier shall be one which, however high it is raised, will admit each year a miniature replica of the American people as they are today.

The significance of the major premise can hardly be overemphasized. True, the quota law of 1921 provided for the numerical restriction of alien admissions; but the act itself was purely a temporary expedient to meet a critical situation, and effective for only one year. During that year, attempts were made to draft substitute immigration legislation of a more or less temporary character, and, when these attempts failed, the law of 1921 was continued in operation for another two years, still purely as an emergency measure.

There is nothing temporary, however, in the wording of the new immigration law adopting the national origins formula for immigration control. Debates on the floors of Congress indicated plainly that the legislators felt they were establishing a permanent immigration policy to be followed for many years to come. With the exception of a comparatively few representatives from urban centers containing large settlements of the foreign-born, both the Senate and the House of Representatives were practically unanimous in indorsing the principle of numerical restriction.

TOTAL OF ADMISSIONS FIXED BY CONGRESS

The use of the national origins formula greatly simplifies the problem of numerical control. There is no longer the need for involved calculations with percentages and census statistics in order to determine just how many immigrants would be admitted to the United States under a certain scheme. The primary step in the use of the national origins formula is the fixing of a maximum total of admissions by Congress. In the present law, the annual total under the formula is fixed at 150,000, but, while the principle of restriction is definitely established, the total of authorized admissions may be changed at will. By 1928, for example, conditions may be such that Congress will feel warranted in authorizing a total of 300,000 quota immigrants annually. Two years later, perhaps, it may seem advisable to cut the total admissions to 50,000. Congress will have only to survey conditions and then pass a simple resolution

directing that for a stated period a stated total of quota immigrants shall be admitted annually to the United States.

QUOTAS NATIONAL RATHER THAN RACIAL

Under the national origins formula, the distribution of this immigration total among the various quota classifications becomes merely an administrative function of the Executive Branch of the Government. Each nation already having contributed a certain percentage of the American people will be allotted a corresponding percentage of the immigration total as its quota. In other words, the American people are taken as they stand, and to them each year is added, in whatever number Congress may direct, an instalment of European immigration reproducing in miniature the American composite.

All the quotas are national, not racial. No attempt is made to discriminate between the various racial groups within any nation. Each nation is allowed a fixed quota covering all who reside within its jurisdiction. Under the emergency law of 1921, for example, the quota for Turkey was 2,654 each year. In a typical year, only 158 of the alien admissions charged against the Turkish quota were actually Turks. There were, on the other hand, 658 Armenians, 631 Syrians, and 417 Hebrews. Indeed, more Greeks than Turks entered the United States under the Turkish quota during that year. The point was they all came from territory under the jurisdiction of the Turkish Government. Similar conditions prevail under the national origins formulas, for the United States cannot presume to discriminate between the various peoples within the boundaries of a sovereign nation.

The underlying principle of the national origins formula is that the people of the United States today have a vested and equal right to say who shall join them. While the emergency law of 1921 permitted the foreign-born residents of the United States to determine the distribution of immigration quotas, the national origins formula gives equal voice to native-born and foreign-born alike. The formula seeks to avoid the charge of discrimination by treating all nationalities in proportion as they have contributed to the upbuilding of the American Republic.

The United States had departed definitely from the policy of encouraging white immigration from practically all sources, regardless of origin. Instead, there has been adopted the policy of stringent numerical restriction and the admission of aliens in proportion as the various nations of the Old World are represented in the existing

make-up of the American people. The application of this new policy rests with the national origins formula, the adoption of which marked the most significant step in the direction of immigration control taken in three centuries of American history.

Beard, (4th Ed.), 382–413.
Kimball, *National Government,* pp. 480–520.
Ogg and Ray, (2nd Ed.), pp. 488–517.

XII

THE PRACTICE OF DIPLOMACY

The practice of diplomacy involves two main factors—personnel and policy. The personnel of the Foreign Service has been for generations a football of party politics, booted about by the kaleidoscopic changes in administrations. The appointment of diplomatic officers has been regarded as a means by which the new president might repay obligations incurred during the campaign. But the emoluments have been so small that only rich men could afford to accept diplomatic appointments. In only a few capitals do we maintain homes or offices for ambassadors, whose first task has therefore been to secure suitable quarters. No allowances for official entertainments were made. The young man who aspired to a diplomatic career found that the positions at the top were definitely allocated to rich friends of the President. The Rogers Bill, described in the article by Tracy Lay, indicates the changes which have been made to correct these conditions. Personnel, salary, and allowance difficulties are not wholly removed by the law, but the changes made are important and beneficial.

Foreign policy, for a nation which had maintained its position of splendid isolation for generations, was not vital until 1914. True, in times of stress, such as the Civil War, able men had carried out a definite policy. With the World War our foreign policy acquired momentous importance, so that the official attitude of the United States toward every international issue was eagerly awaited. Isolation has become difficult, perhaps impossible, even if desired. The chief factor which has changed this situation is the economic power of the nation. The United States has become a creditor, in an official way through loans made to the Allies during the War, and in a private way through the billions loaned by banking houses, etc., to the governments and industries of Europe. Isolation is not a reality. Secretary Lansing illustrated the point when he said: "The United States has become economically and politically the pivot of the world." This statement indicates a second idea—that the economic and the political policy cannot be separated. The Rogers Bill provides for the union of the two services: the consular and the diplomatic. This is a significant recognition of a real situation. Economic recognition leads to political recognition, and the fusion of the two branches is logical when we consider that the two most important international questions before the 1926 Congress were the funding of foreign debts and our entrance into the World Court.

49. FOREIGN SERVICE REORGANIZATION[1]

By Tracy Lay

While the general policy governing the nature and the degree of American participation in international affairs may still be regarded as a contested issue, an unequivocal decision has been reached with respect to our foreign service.

Through the enactment of the Rogers Bill, for the reorganization and improvement of the foreign service, a basis has been fixed and a structure provided which are destined to place the foreign representation of the United States in the forefront of diplomatic efficiency. It is not to be concluded that this strengthening and remodeling of the diplomatic machinery is necessarily anticipatory of a forthcoming broader participation in world affairs, or that Congress has acted in the reverse order of logic by perfecting an instrumentality for the conduct of our foreign relations before the nature and the extent of those relations have been finally determined. The need of a strong foreign service is obvious.

The position of the United States has become so commanding that its every act, whether of a positive or of a negative character, is fraught with important consequences to other nations and not infrequently with equally important repercussions at home. A policy of isolation or aloofness, in which the interests of the world are engaged, is perhaps even more difficult to maintain than a policy of active participation.

The problems which confront the foreign service do not depend for their reality upon the degree of our participation in world affairs; they are inherent in the position which the United States has assumed as an economic, political, and potential, military factor.

In 1919 Secretary Lansing issued the following warning by way of supporting his estimates for increased appropriations:[2]

"The Government now faces a decision with respect to the conduct of our foreign relations. It must reorganize and greatly enlarge the Department of State or there will be a breakdown of the most serious character. The Department will not function on its present basis under the burden of the new load."

This forceful declaration was not inspired by the prospect of active participation in such enterprises as the League of Nations, but

[1] Reprinted from the *American Political Science Review*, November, 1924, by permission of the editor.

[2] Letter to the Secretary of the Treasury, November 10, 1919.

was based upon the fact that the United States had become "economically and politically the pivot of the world," and that "prosperity at home is inextricably bound up with the progress of business and politics abroad."

Four years later Secretary Hughes, in his testimony before the House committee on foreign affairs, still further emphasized the increasing importance of international questions as follows:

"We need the very best representation abroad that we can get. Instead of getting out of difficulties, I mean international difficulties, they multiply. Whatever the future may be, the present shows a constant increase of important situations, of new interests, of new problems, to which we must address ourselves with all the ability that we have at our command." [3]

The genesis of the present foreign service is to be traced to the Act of April 5, 1906, which classified consular officers and made possible the issuance by President Roosevelt of the Executive Order of June 27, 1906, placing the consular service on a civil service basis. A similar status was given the diplomatic service by President Taft through the Executive Order of November 26, 1909.

Prior to 1906, both the diplomatic service and the consular service were administered on a political basis under what is known as the "spoils system." The reform of that year inaugurated the "merit system," under which admittance to the lower grades was gained through rigid competitive examinations, and subsequent promotions were won through demonstrated ability and efficiency. The results were highly satisfactory. Upon the advent of the Wilson administration in 1913, the system, which rested solely upon the insecure basis of two executive orders, was perpetuated and further strengthened by legislation.[4]

No glaring defects or inadequacies were discernible in the period before the war, when the United States occupied the position of a second-rate power, happy in the security of its isolation and content in the ease of its self-sufficiency. The desirability of suitable foreign representation was obvious, but the necessity for a strong service was not recognized.

The first lesson came as a shock. As Secretary Lansing afterwards admitted:

"The European war came upon the United States in 1914 as a surprise chiefly because its Department of State through inadequate equipment had been unable to gather information and interpret it in a manner which would reveal the hidden purposes of the governments

[3] Hearings on H. R. 17, January 14, 1924.
[4] Act of February 5, 1915.

by which hostilities were precipitated. Possibly no blame can be imputed to the Government for this laxity in view of the general confidence in the supremacy of international justice; but today, after the experiences through which we have passed, no reasonable effort must be spared to make a similar surprise impossible in the future." [5]

In post-war conditions many past negligences and future necessities were revealed. Diplomacy had registered, or contrived, the most enormous failure in history; therefore its processes must be changed; it must be democratized. Erstwhile political questions had become economic in character, and the interdependence of nations was proved; a new type of diplomatist was required. The United States had shifted to a position of financial and general economic preponderance, while other nations were forced to resort to empirical formulæ and artificial devices in their efforts to regain and reconstruct; new diplomatic objectives had appeared. The foremost nations began at once to reorganize their foreign establishments.

Taking inventory of our new position, whether it be by examining the rates of taxation, the status of our loans, the distress of agriculture, or the industrial outlook, we find that the search leads us inevitably to a consideration of conditions abroad and the state of our international relations, to the field of our foreign service.

The objects to be achieved through a reorganization of the foreign service were suggested by the very nature of its limitations and incongruities. In the diplomatic service, because of the inadequate rates of compensation, appointments, from the highest ranking ambassador to the lowest ranking secretary, were of necessity made from men possessed of such considerable private fortunes as to be able and willing largely to pay their own way. Apart from other considerations, this had the effect of restricting the field of selection to a small number of candidates among whom ability was not in all cases the controlling requirement.

There being no assurance of eventual promotion to the grade of minister, even after a life-time of meritorious service, the normal, ultimate reward of the career was the position of counselor of embassy or legation, on a salary of four thousand dollars a year. Even in this position of distinction the officer would remain subordinate to a chief of mission who, in most cases, was a political appointee of no diplomatic training or experience.

The work of the diplomatic service being considered as purely political, its officers possessed no wide experience in commercial

[5] Letter to Hon. Stephen G. Porter, Chairman, Committee on Foreign Affairs, H. R. January 21, 1920.

matters, and yet the economic factor in diplomacy had come to be of almost transcendent importance. Indeed, it is largely the economic urge of a nation that governs its internal political issues and its foreign policy alike.

Salaries in the consular service were more than twice as high as those paid in the diplomatic service, but were still too low for the character of representation required. The consuls general at London and Paris received $12,000 a year. This applied, however, to only two posts, while the range below that grade was from $8,000 downward.

The two services, both under the department of state, were separately administered. There was no interchange of personnel, as this was rendered impracticable by the discrepancies in their respective salary scales. Thus, the consular service had no natural outlet and the career stopped with the grade of consul general. Furthermore, there being no provision for retirement, many of the positions in the upper grades were rapidly becoming clogged by officers who had reached the age of superannuation, thus effectively shutting off the prospect of promotion for the younger and more active men below them. The condition thus created was rapidly draining the service of its good men, many of whom felt themselves forced to yield to the temptations of the business world by accepting the lucrative positions for which their consular training had equipped them.

The work of the consular service is principally commercial as contrasted with the political work of the diplomatic service.[6] Thus in the prevailing system of separate administration, the political and the economic factors, so closely combined in all international questions of today, found themselves uncoördinated and as widely removed from one another as the two careers were separate and distinct.

The first object to be achieved under the reorganization plan was to open the career to talent and ability without regard to the private fortunes of the candidates. The second object was to attract and

[6] "Speaking generally, of course, the diplomatic branch of that service is the first line of the country's defense, and the Consular Service is the spearhead of the country's trade." (Hon. John W. Davis, statement at hearings before the committee on foreign affairs on H. R. 17, Dec. 19, 1922.)

"While many of the duties of diplomatic secretaries differ widely from those of the consular officers there is a vast domain of activity in which their functions are essentially the same, as for example, the protection of American interests; the study of foreign conditions; the gathering of information; and the reporting of important events on which the State Department may base its policies and its course of action." (Secretary Hughes in the *Congressional Digest,* January, 1924.)

hold strong men by offering a sufficient reward for meritorious services, by which is meant a reasonable chance of eventual promotion to the grade of minister. The third object was to achieve interchangeability so that a man in either branch of the service could be placed according to his peculiar fitness. There is also involved in the principle of interchangeability a closer coordination of the political and the economic factors aforementioned, in that the commercial experience of the consular service, plus the political experience of the diplomatic service, when combined in a single officer, gives promise of producing a new and broader type of diplomatist. Lastly, there must be a retirement system.

Addressing itself to these aims, the Rogers Bill [7] adopted a new and common salary scale, ranging from $9,000 in class one, downward to $3,000 in class nine, with unclassified, subordinate grades from $3,000 downward. Standing alone, this rate of compensation would not suffice for the purposes mentioned, were there no other benefits accruing. Officers in the foreign service are prohibited by law from engaging in business in the countries in which they are stationed, and therefore have no occasion to supplement their statutory salaries by earnings from other sources. The very nature of their work makes important demands upon their resources in the matter of maintaining an appropriate standard of living and keeping up the representation of their country through continuous personal contact with foreign officials, business men, and other important personages. Even the amenities due the prominent American officials who visit their posts constitute a considerable drain on their modest stipends. It is impossible to save from the salaries paid.

The next step undertaken by the bill was to create a new title of foreign service officer, which became the basis of salary, and of interchangeability. This title is common to all officers of career, whether serving in the consular branch or in the diplomatic branch of the service, and governs their classifications. It is a superimposed title for administrative purposes only, and does not abolish the title of secretary or of consul through which the foreign status of those

[7] Introduced by Hon. John Jacob Rogers of Massachusetts as H. R. 17, 1st Sess. 67th Cong.; revised in department of state and reintroduced upon the recommendation of President Harding as H. R. 12543; passed the House of Representatives by a vote of 203 to 27; reported unanimously by the committee on foreign relations of the Senate, but failed of passage in the closing days of the Congress. In the 68th Congress the bill was again introduced as H. R. 17, reported from the committee on foreign affairs, as amended, under the number H. R. 6357; passed the House May 1, 1924 by a vote of 134 to 27; passed the Senate by unanimous consent May 15, 1924; approved May 24, 1924.

representatives is fixed.[8] A candidate now enters the foreign service by qualifying as a foreign service officer, the requirements for which are an examination, with a suitable period of probation in an unclassified grade, or five years of continuous service in the department of state. As to whether an officer thus appointed shall be assigned to the diplomatic or the consular branch is a matter for administrative determination.

The original bill provided for the classification of ministers into two classes,[9] namely: minister, class one, $12,000; minister, class two, $10,000. This was intended to suggest a continuance of the classified career service up through the grade of minister to that of ambassador, with a view to influencing the selection of trained, career officers for those positions. Embarrassments at once developed in this connection, as the assumption of legislative jurisdiction in relation to the appointment of ministers seemed to threaten an encroachment upon the constitutional powers of the President by seeking to limit or influence his choice of men.[10] How to encourage the selection by the President of career men for appointment to the grade of minister was an exceedingly difficult problem unless the classified service could be so extended as to include that grade.

Finally, a more effectual method was adopted. It consists of the simple formula of building a service in which the career officers will be men of such outstanding ability that their qualifications must, perforce, commend themselves to the President as against the claims of untrained political applicants from the outside. But even then, some instrumentality for focussing attention upon the meritorious achievements of the men in the service seemed indispensable as a means of advancing their claims for consideration. The manner in which this has been accomplished will be shown later in discussing the administrative regulations. But this was not all of the difficulty; for the grade of minister is exacting in its pecuniary requirements, and no career officer, however able he might have proved himself in diplomatic work, could afford to accept such a position in the absence

[8] Foreign service officers may be appointed as secretaries in the diplomatic service or as consular officers or both: Provided, That all such appointments shall be made by and with the advice and consent of the Senate; Provided further, That all official acts of such officers while on duty in either the diplomatic or the consular branch of the Foreign Service shall be performed under their respective commissions as secretaries or as consular officers. (Section 5, Act of May 24, 1924.)

[9] Section 2, H. R. 17, 1st Session 67th Congress.

[10] He (The President) shall name, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls." (Article II, Section 2, The Constitution.)

of considerable private resources. If the service was to be democratized, and the career, with its rewards, held open to talent and ability, some provision must be made for relieving the burden of expense which devolves upon the higher diplomatic officers of the service.

President Taft very forcibly attacked the anomalous situation surrounding the position of minister and ambassador in 1910 when he stated:

"We boast ourselves a democratic country. We say that there is no place within the gift of the people to which we may not select the most humble inhabitant, providing he be fit to discharge its duty and yet we have an arrangement which makes it absolutely impossible for anybody but a millionaire to occupy the highest diplomatic post. Now I ask you whether that is consistency; whether it is not the purest kind of demagogy? By demagogy I mean the arrangement of an argument which seems to be in favor of democracy but which, when it actually works out, is in favor of plutocracy." [11]

Secretary Hughes recently voiced a similar criticism in discussing the situation in the diplomatic service, by asserting:

"It is a most serious thing to be compelled to say that a young man without means, who desires to marry and bring up a family after the American tradition, can not be encouraged to enter one of the most important careers that the country has to offer. I say bluntly that no American can face the facts without a sense of humiliation, and he is compelled to qualify his boasting of our intelligence and civilization so long as this condition continues." [12]

In seeking to remedy this condition, it was not deemed practicable or desirable to increase the salaries of ambassadors and ministers to a point that would cover all expenses incidental to representation and the maintenance of suitable diplomatic establishments abroad. The salaries of $17,500 in the case of ambassadors and $12,000 and $10,000 in the case of ministers were thought to be adequate when construed as a measure of compensation for services rendered. Lifting from their shoulders the burden of official, as contrasted with personal, expenses which rightfully belong to the government, became, then, a question of an additional allowance and not of an increase in salary. Other nations have for years granted to their diplomatic representatives what are known as frais de representation, which include a wide range of such expenditures. Adopting this principle, the bill authorized the President to grant to diplomatic missions and to consular offices at capitals of countries where there is

[11] Address before the National Board of Trade, January 26, 1910.
[12] Address before the Chamber of Commerce of the U. S., May 18, 1922.

no diplomatic mission of the United States, representation allowances, the expenditure of which is to be accounted for in detail under regulations prescribed by the President. The enactment of this provision [13] constitutes one of the signal achievements of the new law.

Its salutary effect was brought out strongly by the Honorable Theodore E. Burton, temporary chairman of the Republican National Convention, in his keynote speech of June 10, 1924, as follows:

"We have passed and the President has approved the so-called Rogers Bill, placing our Diplomatic and Consular Service, with its rapidly increasing importance, on a higher plane and giving opportunities to others than millionaires to occupy the more important positions."

Through representation allowances, therefore, it now becomes feasible to promote career officers of ability, who are not men of wealth, to the grade of minister with the satisfying realization that their talents are henceforth available to the country and that such service in the national interest is brought within the range of their legitimate aspirations.

The retirement system, which constitutes the last of the four chief provisions of the law, is an adaptation of the civil service retirement and disability Act of May 22, 1920. It provides for contributions from the men at the rate of five per centum of their basic salaries and not exceeding an equal amount from the government. The age of retirement is sixty-five years, but the President may continue an officer on active duty until the age of seventy. The rate of annuities follows the percentage range established in the civil service retirement act, based on length of service and the average of the basic salary for a period of ten years next preceding the date of retirement, but eliminates the arbitrary maximum and minimum provisos.[14] The benefits of retirement are retained in the case of officers promoted from the classified service to the grade of minister.

In the eventual working out of the retirement provision, the relative proportion between the amount contributed by the men in the service from their salaries and by the government through appropriations will be seventy-two per cent. for the men and twenty-eight per

[13] Section 12 of the Act of May 24, 1924.

[14] "Annuities shall be paid to retired Foreign Service officers under the following classification, based upon length of service and at the following percentages of the average annual basic salary for the ten years next preceding the date of retirement: Class A, thirty years or more, 60 per centum; Class B, from twenty-seven to thirty years, 54 per centum; Class C, from twenty-four to twenty-seven years, 48 per centum; Class D, from twenty-one to twenty-four years, 42 per centum; Class E, from eighteen to twenty-one years, 36 per centum; Class F, from fifteen to eighteen years, 30 per centum."

cent. for the government, thus realizing a system which approaches a self-sustaining basis.

Perhaps of equal importance to the Act itself are the administrative regulations,[15] giving practical effect to all the chief purposes of the law. In the new service all vacancies from class one to class nine are to be filled by promotion from lower classes, based upon ability and efficiency as shown in the service, and all admissions to the service are to the grade of foreign service officer, unclassified; that is, to the lowest grade.

The important function of personnel control is entrusted to a foreign service personnel board, composed of the undersecretary of state, two assistant secretaries of state, and three foreign service officers of high rank who constitute the executive committee of the board.

The authority of the board is advisory only and its recommendations are always subject to the approval of the secretary of state and of the President. All action taken by it is strictly non-partisan, and based exclusively upon the record of efficiency of the officers concerned. Its members, individually and collectively, have the authority to examine all records and data relating to the personnel of the service. In adjusting the reclassification of officers under the Act, the board was charged with examining into the character, ability, efficiency, experience and general availability of all officers for the purpose of establishing their relative ratings and making recommendations to the secretary of state.[16]

The permanent duties of the board include recommendations for the designation of counselors of embassy and legation; promotions within the service; assignments to posts; transfers from one branch of the service to the other; the appointment by transfer of those officers and employees of the department of state who, after five years of continuous service therein, have demonstrated special ability; and to submit to the secretary of state the names of those foreign service officers who, in the opinion of the board, have demonstrated special capacity for promotion to the grade of minister. Each list thus submitted enumerates the names of the officers in the order of merit and is complete in itself, superseding all previous lists. A list of this character is submitted whenever there is a vacancy in the grade of minister or when requested by the President or the secretary

[15] Executive Order of the President, June 27, 1924.

[16] In the general reclassification effective July 1, 1924, there were 32 retirements on account of age; 5 officers dropped from the unassigned list of the diplomatic service; 8 diplomatic secretaries and 13 consular officers demoted; and 2 resignations. All other officers were reclassified as stipulated in the Act.

of state, and in no case does it contain more names than there are vacancies to fill. Each such list is signed by the chairman and at least three members of the board, and if approved by the secretary of state is submitted to the President.

The board also considers controversies and delinquencies among the service personnel and recommends appropriate disciplinary measures where required.

Whenever it is determined that the efficiency rating of an officer is poor and below the required standard for the service, the personnel board so notifies the officer, and if after due notification his rating continues nevertheless to be unsatisfactory, his name is reported to the secretary of state with a full recital of the circumstances and a recommendation for separation from the service. In each case where such recommendation is made, the board at the same time notifies the officer of the action taken.

The proceedings of the board are strictly confidential, but it is made a part of the duty of the chairman, within a reasonable time prior to each meeting of the board for recommending promotions, demotions, or removals, to invite the chairman of the Senate committee on foreign relations and the chairman of the House committee on foreign affairs or some committee member designated by the chairman, to sit with the board through its deliberations without, however, participating in its decisions.

As an adjunct to the work of the personnel board the secretary of state has provided [17] for a complete survey once a year of all personnel records, ratings and accumulated material by an impartial board of review, which renders its report to the foreign service personnel board as a basis for fixing the relative standing of officers and employees.

The board of review is composed of five members, under the chairmanship of the chairman of the executive committee, the remaining four being selected from foreign service officers of high rank by the secretary of state.

In addition to the personnel board, there is a board of examiners composed of the undersecretary of state, two assistant secretaries of state, the chairman of the executive committee of the foreign service personnel board, and the chief examiner of the civil service commission, or such person as he may designate in his stead.

The former diplomatic and consular examinations are consolidated into one examination for candidates, consisting of a written and an oral test. The subjects include: At least one modern language other than English (French, Spanish, or German by preference), and

[17] Departmental Order No. 295, June 9, 1924.

elements of international law, geography, the natural, industrial, and commercial resources of the United States; American history, government and institutions; the history since 1850 of Europe, Latin America and the Far East; elements of political economy, commercial and maritime law.

We come now to an important innovation which is certain to evoke wide-spread interest and approval.

In the original Rogers Bill [18] there was a provision for the designation by the secretary of state, after preliminary examination, of foreign service pupils, between the ages of eighteen and twenty-five years to attend universities for a period of not less than three years, for the purpose of following stipulated courses of instruction preliminary to their appointment as foreign service officers. Such pupils were to receive an annual allowance of not exceeding $1,500 for expenses of subsistence and tuition, and were to enter into a written contract to remain in the service for a period of not less than five years from the date of appointment.

Such a diversity of opinion developed with respect to the merits of this experimental proposal that it was thought best, in the course of the revision, to eliminate it from the bill as not essential to the general plan of reorganization, and as a possible encumbrance to the measure.

The law, as enacted, provides for "a suitable period of probation in an unclassified grade" as an entrance requirement. By taking advantage of the opportunity thus afforded, it became possible to establish for the first time, an intensive course of instruction for all new appointees, giving them a thorough grounding in matters of fundamental import in connection with the foreign relations of the United States. Accordingly, the President by executive order, has established a foreign service school in the department for the instruction of new appointees.

The school is under the direction of a foreign service school board, or faculty, composed of the undersecretary of state, two assistant secretaries of state, the chairman of the executive committee of the foreign service personnel board, and the chief instructor of the foreign service school. The chief instructor is selected by the other members of the school board from among the officers of the foreign service, with the approval of the secretary of state. Other instructors are selected from among the qualified officers of the department of state, the foreign service, the other executive departments of the government, and other available sources in the discretion of the school board.

The term of instruction and of probation is one year, during which

[18] Section 15, H. R. 17, 1st Session, 67th Congress.

the new appointees are judged as to their qualifications for advancement and assignment to duty. At the end of the term, recommendations are made to the secretary of state by the personnel board for the dismissal of any who may have failed to meet the required standard of the service.

In order to give a thoroughly dependable appraisal of the reorganization act, the following is quoted from the testimony of Honorable Wilbur J. Carr,[19] at that time director of the consular service, now assistant secretary of state:

"In my judgment there have been two really fundamental measures in the entire history of this country for the improvement of the foreign service. The first was in 1856, when a bill was passed, . . . which gave form to the diplomatic and consular organization. . . . It was not until 1906 that there was another bill which pretended to improve the service, and that bill related wholly to the consular service and was a very excellent measure, and without which this bill could probably not be considered now. But the second measure in all the history of this country in relation to the foreign service, and by far the most important and most far-reaching, is this measure which you have before you. There has not been anything like it since the Government began to exist. In my judgment, if you enact it, you have a bill which will furnish the basic structure of the organization for your foreign service for 50 years, a bill on which you can build any kind of a foreign service you please, a bill on which you can provide for ministers and ambassadors, secretaries and consuls, in the light of what you believe to be responsive to the opinion of the country. I do not think I can stress too much the importance of this bill being enacted into law."

That Secretary Hughes is highly pleased with the reform in which he has played such an important rôle is evidenced by his recent brief summing up of the achievement:

"Through the passage of the Rogers Bill the serious limitations and inadequacies inherent in our present Foreign Service adjustment have been removed, and a substantial basis of reorganization achieved. The date of its enactment marks the birthday of the new service broadened in the rewards which it offers to men of ability, permanently stabilized by statute, coördinated by amalgamation rendered mobile by interchangeability, democratized and Americanized through a scale of compensation and representation allowances which eliminate the necessity for private incomes, and definite in its assurances that men who have spent their lives in the service will not be left devoid of resources when the age of superannuation arrives.

[19] Hearings on H. R. 17, January 18, 1924.

"Through this salutary legislation young men of ambition are offered a career of almost unparalleled opportunity and attractiveness, and the country receives its best assurance of security and substantial achievement in the future conduct of its foreign affairs." [20]

50. AMERICA AN INTERNATIONAL INVESTOR[1]

By Alvin Johnson

At the opening of the century the international credit position of the United States was that of debtor nation. Hundreds of millions' worth of exports were required each year for interest and amortization on foreign investments in America. We were already a people rich in capital but the industrial opportunities of the country were so numerous that our own capital did not suffice for their exploitation. We drew in capital from all western Europe, mainly through the British market.

Gradually the stream of inflowing foreign capital abated, partly because of the superior appeal of other investments—increased borrowings by European governments preparing for war, colonial developments, economic movements in Latin America and the Far East—but mainly because the increasing volume of American savings approached adequacy to the national capital requirements. The War, with its insatiate demand for credits, put an abrupt end to American borrowrings from Europe and evoked in turn a heavy flow of American capital abroad. By the end of the War the balance of international indebtedness stood $3,000,000,000 in America's favor, even if exception be made for the direct borrowings from our government by the Allied nations. We had gained the position of a creditor nation. And since the War we have proceeded steadily toward the consolidation of that position.

A recent compilation of the Farmers' Loan and Trust Company of New York gives an excellent summary of the progress of our foreign investments since the War. New capital loans offered in the United States, public and private, rose gradually from $256,000,000 in 1919 to $1,000,000,000 in 1924. The aggregate of loans—excluding refunding—was $3,284,000,000 for the six years 1919–1924. These figures do not include private loans and credits, of which the aggregate must be enormous. The Department of Commerce esti-

[20] *American Consular Bulletin*, July, 1924.

[1] Reprinted from the *New Republic*, March 25, 1925, by permission of the publisher.

mates the credits advanced to Germany from the adoption of the Dawes Plan until the end of the year at $100,000,000. We shall not be far wrong if we adopt the current financial estimate of $1,500,000,000 for the total capital export of 1924 and $5,000,000,000 for the six year period. Nor can we be on unsafe grounds in predicting that for at least the next five years our capital export will increase. By 1930 we shall probably be creditors to the extent of fifteen billions irrespective of the sums foreign governments owe directly to our own.

Of the total of foreign loans offered in the six years, 40 percent. were for Europe, 30 percent. for North America (mostly Canada), 23 percent. for Latin America and 7 percent. for the Far East. Government borrowings represented 69 percent. of the total. If private credits were taken into account, the percentages of Europe and Canada would be materially increased. Probably half of our aggregate capital export in 1924 went to Europe, and half of this export to Europe took the form of private credits and investments. When we consider how seriously Europe, especially Germany, still suffers from dearth of liquid capital we may assume that these proportions will hold for a number of years. Whatever our political theorists may think about the advisability of "keeping out of Europe" our business is going deeper and deeper into Europe.

Business is going into Europe by the natural channels of trade. The private credits and loans are made chiefly for the financing of exports, raw materials and foodstuffs and to a less degree manufactured goods and machinery. We are lending to restore the European industrial machine. Our private loans and credits to Canada and the Far East have the same purpose. Only the Latin American loans serve mainly the purpose of developing transportation and extractive industries which may make available raw materials for our industrial use.

To the individual business man or investor this process of international investment presents no new problem. Krupp needed $10,000,000 of floating capital and was willing to pay 7 percent for a five year loan. The security looked perfectly good. Many American investors regarded the opportunity as an extremely favorable one. A German importing house found a market for $10,000,000 worth of cotton. Its credit was good; its customers of unquestioned solvency. What could be more natural than an extension of credit by a New York bank for financing the transaction?

The immense and swelling volume of these international investments does, however, present a new national problem. All these investments are earning interest and profits which will finally have to be transmitted to the United States. If part of the return is rein-

vested abroad, this only postpones the day when the actual transfer must be made and increases its magnitude. The individual investor may think he will be paid through the shipment of gold, but no significant part of the aggregate international payment can be made in this way. When our foreign investments reach fifteen billions, the annual return to be transmitted to America will hardly be less than $900,000,000, a sum more than twice the maximum probable world production of gold. We shall have to take our payment in goods or services.

How great a revolution in trade we shall have to undergo is clear from the fact that we shall have to replace our present excess of exports, averaging over $1,800,000,000 in the last five years, by an excess of imports—visible and invisible—of $900,000,000. Either we shall have to reduce our exports or increase our imports by huge figures.

American travellers abroad are estimated to spend half a billion and foreign-born residents transmit to their relations abroad perhaps a quarter of a billion annually. Possibly these items may increase to an aggregate of a billion. Our ships carry now about one-third of our imports and two-fifths of our exports; accordingly we must pay out a considerable sum net for freights. But with all due allowance for such invisible items in the international balance, and for a possible import of half the world production of gold, we shall still have an annual balance of at least a billion and a quarter to dispose of before we can bring home all the interest that will be due us in 1930.

Are there signs that our exports will be curtailed? They fell off greatly in the last three years—from an average of over seven billions in the first three years after the War to an average of under four billions. They are pretty sure to advance again if European industry recovers. Cotton, mineral oils, copper, foodstuffs—our principal items of export—are kept at a low level of consumption in Europe solely on account of the general poverty. Neither is there any reason for thinking our exporters of manufactures intend to stand still in the next half decade, in the face of a gradually improving world market.

Shall we then look to an increase in imports? We may remind ourselves that both our exports and our investments go mainly to industrial Europe, whence payment may be had directly only in the form of manufactured goods. Old mercantilistic habits of mind direct our attention to the possibilities of the three-cornered trade. We may send cotton to Germany and take our pay in coffee from Brazil, purchased in the first instance with German manufactures.

We shall never get far, however, toward an understanding of inter-

national trade if we perisist in the juggling of artificial conceptions like the barter of raw materials against manufactures. The exchange of one kind of manufactured product against another, of one kind of raw material against another is just as prominent a fact in international trade and just as significant for prosperity. We import vast quantities of raw silk from Japan and export to Japan vast quantities of cotton. The welfare of the Japanese silk producers and of our cotton producers depends on this exchange of materials. It is a pure superstition that there is no gain to industrial nations except in the exchange of manufactures for materials.

We are plainly destined to take a largely increased volume of European manufactures, unless we intend to make a free gift to Europe of the sums we are investing with her. Industrial protectionists may attempt to fight against destiny, and by raising duties may make it more convenient for a time to reinvest interest abroad rather than bring it home in the form of manufactured goods. But this would mean a steadily increasing principal of foreign investments and a consequent increase in the pressure of funds for transmission to America.

We shall have to educate ourselves out of the notion that imported manufactures are injurious. This did no great harm so long as we were a debtor nation. As a creditor nation we can't afford it. If we were wise we should not delay long in smoothing out the road for European imports. It would be useful for our producers to learn that the American market is capacious enough to absorb a large volume of foreign goods, as well as our own production, at fair prices. Moreover, the freer admission of European manufactures would hold our investments abroad within more reasonable limits. Germany, for example, would not need to draw so heavily on credit to finance her purchases of material if her manufactures found a tolerably easy access to our markets.

This may not appear to be a desirable result to those who view with gratification the progress of America as a creditor nation. It is easy to carry conceptions derived from private relations over into the international field. In private relations the position of creditor is generally regarded as an enviable one. That, however, depends entirely on the safeguards he enjoys under the law. Where the law is unreliable one is far more comfortable with his wealth under his own roof than with it outstanding among potential repudiators.

Our foreign investments depend for their ultimate security on the personal honor of merchants and the public honor of governments, on international law, such as it is, and on the international influence of our government. That is enough, in time of peace. How far

from enough it is in time of war was demonstrated by the fate of the pre-war investments of Germany.

It is better, in the present condition of the world, to keep most of our capital inside our own boundaries. If we become a creditor nation in any considerable measure, every international crisis will administer a shock to our financial system and becloud our general economic outlook. While the rest of the world is starved for capital, it is no doubt desirable that America should grant credit freely. But she should be prepared to readjust her commerce and take most of her capital home when European industry is again functioning energetically and creating the capital it requires.

There is a further and more powerful reason why it is desirable that America should not become permanently involved in extensive investments abroad. So long as such investments consist largely, as now, in reconstruction loans to fully developed nations, they do not entail disturbing political consequences. But the fully developed nations will sooner or later displace alien capital by their own. If we then persist in maintaining the rôle of creditor nation we shall be forced to shift our investments to the less developed parts of the world—Asia, Africa, tropical America—where economics and politics, national and international, are inextricably intertwined. We shall have plunged ourselves deep into the sink of economic imperialism. Powerful factions of our citizens will seek to employ our government as part of the machinery by which they advance and consolidate their fortunes. Other governments have succumbed to such forces and ours is not so organized as to be able to present great powers of resistance. We shrink from formal political entanglements with foreign nations, and wisely. An expanding system of permanent foreign investments will entangle us more surely, more hopelessly, than any League or Alliance.

The proper economic field of our labor, enterprise and investment is at home, within the boundaries of the United States. What lies beyond is not worth the price.

51. CONDITIONS UPON WHICH THE UNITED STATES WILL ENTER THE WORLD COURT[1]

THE SWANSON RESOLUTION

The Swanson Resolution (S. Res. 5) as modified by Senator Swanson Jan. 23, '26 was agreed to by the Senate Jan. 27, '26, by a vote of 76 to 17.

[1] Reprinted from the *Congressional Digest,* February, 1926, by permission of the editor.

Whereas the President, under date of February 24, 1923, transmitted a message to the Senate accompanied by a letter from the Secretary of State, dated February 17, 1923, asking the favorable advice and consent of the Senate to the adherence on the part of the United States to the protocol of December 16, 1920, of signature of the statute for the Permanent Court of International Justice, set out in said message of the President (without accepting or agreeing to the optional clause for compulsory jurisdiction contained therein), upon the conditions and understandings hereafter stated, to be made a part of the instrument of adherence: Therefore be it

Resolved (two-thirds of the Senators present concurring), That the Senate advise and consent to the adherence on the part of the United States to the said protocol of December 16, 1920, and the adjoined statute for the Permanent Court of International Justice (without accepting or agreeing to the optional clause for compulsory jurisdiction contained in said statute), and that the signature of the United States be affixed to the said protocol, subject to the following reservations and understandings, which are hereby made a part and condition of this resolution namely:

1. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the treaty of Versailles.

2. That the United States shall be permitted to participate, through representatives designated for the purpose and upon an equality with the other states, members, respectively, of the Council and Assembly of the League of Nations, in any and all proceedings of either the council or the assembly for the election of judges or deputy judges of the Permanent Court of International Justice or for the filling of vacancies.

3. That the United States will pay a fair share of the expenses of the court, as determined and appropriated from time to time by the Congress of the United States.

4. That the United States may at any time withdraw its adherence to the said protocol and that the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States.

5. That the court shall not render any advisory opinion except publicly after due notice to all states adhering to the court and to all interested states and after public hearing or opportunity for hearing given to any state concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching

any dispute or question in which the United States has or claims an interest.

The signature of the United States to the said protocol shall not be affixed until the powers signatory to such protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adherence by the United States to the said protocol.

Resolved further, As a part of this act of ratification that the United States approve the protocol and statute hereinabove mentioned, with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and any other state or states can be had only by agreement thereto through general or special treaties concluded between the parties in dispute; and

Resolved further, That adherence to the said protocol and statute hereby approved shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall adherence to the said protocol and statute be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions.

DETAILS OF THE RESOLUTION EXPLAINED BY SENATOR SWANSON

The American representatives who will sit with the Council or the Assembly of the League of Nations for the election of judges of the World Court, will be appointed by the President, with the advice and consent of the Senate since under the Constitution of the United States all appointments not otherwise specified are made by the President subject to confirmation by the Senate, Congress could pass an Act specifying otherwise.

The United States can have several representatives sitting with the League Council and Assembly for the election of judges of the World Court, but can have but one vote in the Council and one vote in the Assembly, since no other member has more than one vote in each of these bodies.

America's share in the cost of the World Court will be estimated by the League of Nations but must finally be fixed by the Congress of the United States. The item covering this cost to America will be contained in the annual appropriation bill for the U. S. Department of State, presented to Congress through the Director of the Budget

and passed upon by both Houses of Congress. It is estimated that America's share in the cost of the World Court will be the same as that of other big nations, such as Great Britain, France and Japan. Great Britain's share under last year's budget (1925) of the World Court was approximately $35,000.

Should the United States desire to withdraw from adherence to the World Court it may exercise its right to do so as it would under any other treaty. This right can be exercised by Congress by the passage of Joint Resolution. The Supreme Court of the United States has decided that an Act of Congress has equal dignity with a Treaty. Therefore an Act of Congress passed subsequent to the ratification of a treaty abrogates the treaty.

The statute of the Court makes no provision for amendment. Therefore, it was thought wise to make a reservation covering this point. Under the terms of this reservation the court statute can be amended only with the assent of the United States.

The statute of the World Court provides that no nation is bound by a decision of the Court unless it is a party to the case. Reservation No. 5 is to protect the United States from being affected by an advisory decision rendered by the Court of the League of Nations.

The World Court can render a decision, but has no power to enforce it. For example, if the World Court should render a decision against the United States involving the payment of money, Congress could refuse to appropriate the money and that would be the end of it. Or, suppose a boundary dispute were decided against the United States and the Court rendered an opinion that the United States should recede from the existing line. The United States could refuse to move and nothing could be done by the Court to enforce its opinion. Again, suppose the question at issue involved our rights to fish off Newfoundland. We will assume that the World Court rendered a decision that we had no right to do so and that our fishermen declined to abide by the decision; it would then be incumbent upon Great Britain to drive our fishermen out of its waters.

If the United States should agree to submit a case to the World Court and a decision is rendered that would end the matter. To submit the case the United States would be acting under a treaty. The United States Senate would have no authority to pass upon the acceptance of the verdict after it was rendered.

To take a case before the World Court the United States would open negotiations with the other nation involved, through the U. S. Department of State. In addition to having the power to pass upon a treaty after it has been negotiated by the President, through the

Secretary of State, the Senate also has the power to advise beforehand. Therefore, the initiative in negotiating an agreement to take a case before the World Court could come either from the President or the Senate.

With the negotiations completed the Senate would have to ratify the agreement before the case could be formally presented to the Court.

As to the jurisdiction of the Court, it can take up any matter of a judicial character. How successful in the settlement of international disputes the Court of International Justice proves to be will be the measure of the practical usefulness of the court.

The note to the Nations signatory to the World Court, setting forth the conditions under which the United States will sign the World Court protocol, will be forwarded to each nation by the U. S. Secretary of State through the Washington embassies or legations of those nations. A certified copy of the Senate resolution will also be forwarded to the Secretary General of the League of Nations, to be placed on record with the League at Geneva.

The method of action by the different nations to which the note will be sent varies widely. In Great Britain, the Foreign Office will lay the note before the Cabinet and the question will be presented to Parliament before final action is taken. In Costa Rica the consent of Congress will be necessary before final action can be taken. In Italy, which is under a dictatorship, Premier Mussolini will have the sole decision.

Under the World Court Statute an objection on the part of a single signatory to the Court to the reservations made by the United States will prevent the adherence of the United States to the Court. At present all nations signatory to the World Court are also members of the League of Nations.

In the event no objection is raised and all nations concerned accept the reservations made by the United States, then this Government formally becomes a member of the Permanent Court of International Justice. The procedure will be for the President to designate a representative to sign the Protocol of the Court, which would probably be done at Geneva.

Beard, (4th Ed.), pp. 323–362.
Kimball, *National Government*, pp. 540–573.

XIII

TERRITORIES AND EMPIRE

Until the opening of the twentieth century the territorial expansion of the United States occupied the thoughts and energies of the nation. When the last frontier was gone, the Spanish-American War brought new territories which have created questions of colonial government new to our people. The Northwest Ordinance of 1789 laid down a definite policy for the acquisition of statehood, and twenty-eight states followed the same procedure of territorial government, enabling act, constitutional convention, and admission by Congress. A colonial policy to correspond with the territorial policy is as yet unknown officially, but unofficially "The Caribbean Policy of the United States," "American Hegemony in the Western Hemisphere," "Spheres of Influence," "Protectorates," "Special American Interests," etc., have become terms which are used with more or less definite meaning. Colonial expansion has been hastened by economic demands directly, as in the case of the Panama Canal Zone, or indirectly, as in our control of parts of Central America, Haiti, and San Domingo. A new term, "economic imperialism," has been applied to these situations. The exigencies of war, the need of coaling stations, bases of supply, etc., have added islands in the Pacific. The Monroe Doctrine has aided us in our efforts to dominate the Caribbean and make it an "American Lake."

Non-contiguous territory occupied by the so-called "inferior races" has raised important questions in regard to the application of the Constitution, of tariff laws, of prohibition, citizenship, etc.

The plea of the Philippines for independence has raised the question of the future status of our possessions. Shall it be statehood, dominion status, partial or complete independence? The question of "self-determination" and the mandate system have introduced new principles which must be considered in a future policy. Economic and military considerations are so weighty that a policy of government may be bound up with their settlement. For example, rubber in the Philippines, bananas in Central America, oil in Mexico, or the naval problem in the Far East may determine the future of our colonial possessions.

52. WHAT ABOUT THE PHILIPPINES?[1]

By Raymond Leslie Buell

I

Trust-busting has been a favorite sport in America. And at the beginning of the twentieth century, we attempted to break up Europe's monopoly of "imperialism." Under the ægis of the Monroe Doctrine we gradually extended our control over the republics of Central America, and under the pressure of strategic necessity, we established an American sphere of influence over the Caribbean. But neither a Monroe Doctrine nor strategic necessity led us into the Philippines in 1898. This, the most troublesome of our possessions, was acquired in a "fit of absence of mind." Nobody thought of annexing the Philippines when the war with Spain broke out. But when they fell into our hands, we were afraid to get rid of them. We could not return them to Spain because she was too weak and too incompetent to govern them, as the Filipino revolts of 1814, 1896, and 1898 had proved. We were afraid to grant the Philippines immediate independence, believing that they would certainly fall into the greedy hands of the Powers who at that time were scrambling for a foothold in China. Add to this Senator Lodge's insistence on the "vast commercial and trade interests, which I believe we have a right to guard and a duty to foster," made in a speech to the Fifty-fifth Congress, and you have an explanation why we have stayed in the Philippines until the present day.

History perhaps will justify this annexation. The people of these islands have been given an orderly government, in a part of the world where, with the exception of an oligarchic Japan, disorder is the rule. Under the guidance of the United States, the Filipinos have developed a national life and demonstrated that the Oriental is really able to govern himself. Unlike the old style imperialism, American policy in the Philippines, to quote the instructions of President McKinley to the American Commission in 1900, has not been designed "for our satisfaction, or for the expression of our theoretical views, but for the happiness, peace, and prosperity" of the Filipinos themselves.

This idea that the government of backward peoples is a "sacred trust" is not new. It was enunciated by the European Powers in

[1] Reprinted from the *Atlantic Monthly*, March, 1924, by permission of the author and publisher.

regard to their African possessions, in the General Acts of Berlin and of Brussels in 1885 and 1890. But the United States has gone further perhaps than any other power in the world to carry this principle of "trusteeship" or "guardianship" into effect. About fifteen per cent of the annual revenues of the Philippines are expended on education, compared with similar expenditures ranging from only two to four per cent in the most enlightened French and British colonies in Africa. In building up this system, the United States has placed increasing reliance upon Philippine teachers, the number of which has increased from 1914 in 1898 to 20,601 in 1920. Whether in the matter of health, public works, or roads, the United States has conscientiously cared for the natives' needs. From the political standpoint, we have also recognized our obligation to the Filipinos, by establishing a legislature in 1907, the lower house of which was elected by the Philippine people, and by passing the Jones Act of 1916, which placed both houses in native hands, with the exception of two senators and nine representatives, appointed by the American Governor-General to represent the non-Christian tribes.

Ordinarily, the relation of guardian to ward is a temporary one—the child grows up. And our policy in the Philippines has always kept in view the ultimate termination of American control. In 1898 General Aguinaldo interpreted the statements of the American Consul-General at Singapore to mean that if the Filipinos supported the American troops in their campaign against Manila, immediate independence would be their reward. But our promises to the Philippines rest upon a more tangible basis than the shadowy remarks of Mr. Pratt, which the State Department later disavowed. At the Republican Convention of 1904, Elihu Root said that the Philippines might eventually be given the same status as Cuba. Dr. J. G. Schurman, president of the first Philippine Commission, said that American policy in the Philippines would "issue in independence." In 1908 President Roosevelt expressed the hope that within a generation the Philippines could "decide for themselves whether it is well for them to become independent." When secretary of war, Mr. Taft said that the American policy "must logically reduce and finally end the sovereignty of the United States" in the islands. In a message to the Philippine people in October 1913, President Wilson said, "Every step we take will be taken with a view to the ultimate independence of the islands, and as a preparation for that independence." The most solemn promise of all, embodied in the preamble of the Jones Act of 1916, declared that "it was never the intention of the people of the United States in the incipiency of the War with Spain

to make it a war of conquest or for territorial aggrandizement," and that "it is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established." Although the late President Harding did not believe in immediate independence, he declared to the Philippines Independence Mission in June 1922 that "whether wisely or not, our disavowal of permanent retention was made in the very beginning, and a reversal of that attitude will come, if ever, only at your request."

These promises have not been empty words. The Filipinos have been given almost complete control over local and provincial government. The governors of the provinces and the presidents of municipalities are elected by the people. The representative Legislature, established by the Jones Act of 1916, has "general legislative power" except that it cannot pass laws violating the Bill of Rights, regulating the trade relations with the United States, or creating a bonded indebtedness beyond ten per cent of the aggregate tax-valuation of real property, and so forth. But the United States still retains direct control of the executive branch of the central government through a Governor-General appointed for an indefinite term by the President of the United States. This official has "supreme executive power" and general supervision and control of all the departments and bureaus of the government in the Philippine Islands." He may veto any act of the Legislature, including individual items in appropriation bills. If the Legislature passes the bill over his head, it is referred to the President of the United States, whose decision is final. Congress may likewise annul laws passed by the Philippine Legislature, and the United States Supreme Court may set them aside for constitutional reasons. If the Philippine Legislature refuses to vote the budget recommended by the Governor-General, the previous year's appropriations automatically continue in force. But no such way is provided to break deadlocks over appointments, which must be confirmed by the Philippine Senate before they can become effective. In short, the Jones Act established a government which is representative of, but not responsible to, the people of the Philippines.

II

Under the administration of Governor-General F. B. Harrison, the gulf created by the Jones Act between the Governor-General and the Legislature was bridged by an institution called the Council of State. This body, established by an executive order in November

1918, so as "to aid and advise the Governor-General on matters of public importance," was composed of the presiding officers of the House of Representatives and the Senate and the heads of the executive departments. Since most of the members of the Council of State were also members of the Legislature, this body worked out a system of coöperation between the Governor-General and the Legislature, which avoided deadlocks and established a semi-responsible government in which native leaders gained some control over administration.

For the first time in the history of our relations with the Philippines, we have now adopted a policy of curtailing the autonomy which they have been allowed to exercise in the past. The reason for this change was forecast by the Wood-Forbes Commission, sent out by President Harding to study the Philippine question in 1921. According to this commission, the period of "Filipinization," extending from 1916 to 1921, had been marked by a "deterioration in the quality of public service, by the creation of a top-heavy personnel, the too frequent placing of influence above efficiency, by the beginning of a political bureaucracy"—a description applicable to almost any American city! Because of this tendency, the Commission recommended that the American Congress declare null and void legislation enacted by the Philippine Legislature diminishing, limiting, or dividing the authority granted the Governor-General under the Jones Act. This idea of absolute executive independence has also been proclaimed by General Wood in his message to the Philippine Legislature. Literally interpreting the Jones Act, he is exercising the powers of his office in entire disregard of the wishes of the Legislature, subject only to the War Department at Washington, which, of course, will give him whole-hearted support.

While he did not abolish the Council of State because so many administrative duties had been imposed upon it by law, General Wood vigorously used his veto power to kill twenty-one bills passed in the first two sessions of the Legislature, compared with the veto of five bills during the whole administration of Governor-General Harrison. Six of these bills, General Wood vetoed on the ground that they infringed upon his power. The remainder concerned purely domestic affairs. It was the contention of Philippine leaders that the application of the veto power to matters of local concern was an exercise of legislative power vested in the Philippine Legislature alone. But this attempt to restrict General Wood was summarily set aside by the communication of Secretary-of-War Weeks, in October 1923, which declared that the "veto power is applicable to all legislation, whether it be local or otherwise."

This summer the Conley affair threw into bold relief General Wood's conception of his office. Conley was a member of the Manila secret service who was suspended from office by the Mayor of Manila, because he was charged with bribery. Although he was tried and acquitted three times in the courts for this charge, the Mayor of Manila, supported by the Secretary of the Interior, José P. Laurel, refused to reinstate Conley because, during the trial, he had refused to answer certain questions on the ground that they might incriminate him. Believing that an injustice had been done, Governor-General Wood ordered that Conley be reinstated—an act which led to the resignation of the Mayor of Manila and the members of the Council of State. Whether or not Conley was a victim of a political frame-up, General Wood's action violated the Philippines Administrative Code, which invested final power of removal of such officers in the Secretary of the Interior. He justified the violation of this provision in the code on the ground that it was unconstitutional because it curtailed the "supreme executive power" granted the Governor-General by the Jones Act. Curiously enough, there is no provision in the Jones Act for amendments. Since the Philippine Legislature is given "general legislative power," it might be argued that the Legislature may amend the Jones Act, subject to the veto of the Governor-General and to repeal by Congress. But the administrative code had been duly approved, and the present Governor-General was therefore obliged to obey it. The strongest argument of all against General Wood's position was that the determination of constitutional questions was in the hands of the courts, and not of the Governor-General. Yet how can a court declare a law unconstitutional unless it is violated? And who else can violate such a law except the executive? Such was the dilemma in which Andrew Johnson was placed when he decided to violate the Tenure of Office Act of 1867. Both Presidents Wilson and Harding refused similarly to obey provisions in the Merchant Marine Act of 1920, directing the abrogation of about thirty commercial treaties, on the ground that the act infringed upon their constitutional power over foreign relations. While these precedents may support General Wood in the Conley affair, the executive interpretation of constitutional questions anywhere is a very dangerous principle, violating the very doctrine of "separation of powers" upon which General Wood so strongly insists. In the Philippines this principle is more dangerous than in the United States, because the Governor-General is subject to none of the political checks which control the President, and because nothing is said about the power to amend the Organic Act.

With the possible exception of the Conley incident, none of the actions of General Wood has been illegal. He is simply construing the Jones Act literally, while his predecessor construed it liberally. In the legal sense, he stands on firmer ground than Mr. Harrison, because the strict construction of grants of sovereign power is a well-established principle of American public law. The Philippine assertion that it was the "intention" of the framers of the Jones Act to give the Philippines local self-government, in which the Governor-General would be a figure-head, has no foundation in fact. When Canada was given responsible government, it was only after express instructions to that effect had been issued by the Colonial Office at London. When Southern Rhodesia was granted responsible government in 1923, it was done by Letters Patent and express instructions to the British Governor there. When the provinces of India were granted semi-responsible government in 1919, an Act of the British Parliament was necessary. But the Jones Act of 1916 contains no similar provisions for responsible government in the Philippines. On the contrary, "supreme executive power" is reserved for an American Governor-General. The final defeat of the Clarke amendment of the Jones Act, providing for independence within four years, is another indication that the framers of the present system of government in the Philippines contemplated neither full self-government nor immediate independence.

III

While General Wood has acted "legally," and while the Jones Act has been desirable as a transitory measure, the permanent retention of the present system of government in the Philippines is bound to be thoroughly unsatisfactory, because it is based on the doctrine of "separation of powers." Good patriots will shout "heresy" when this typically American principle is attacked. But whatever advantages it may have at home,—and they are precious few,—it works very badly when treated abroad. In the United States, Congress and the President are both responsible to the people at election time, although they are presumably independent of each other while in office. But in the Philippines, the Governor-General and the Legislature are responsible to two different authorities—the first to the United States, and the second to the Philippines. A representative legislature, such as established by the Jones Act, gives the Filipinos a forum for criticism which becomes the more violent because they are not obliged, and in fact are unable, to carry into effect the policies which they advocate. As long as this type of separation of powers exists, a

successful government in the Philippines will be impossible. The Legislature may refuse to pass legislation or to confirm appointments requested by the Governor-General, while he may refuse to carry out the laws passed by the Legislature.

Many years ago, the British Empire learned the dangers of a representative by an irresponsible government in its colonies. In 1866 it abolished the representative constitution of Jamaica because that constitution had produced so many deadlocks between the local Legislature and the British Governor. In most of its Crown colonies, the British Empire has now established legislatures with "official majorities," controlled, when necessary, by the British Governor. More advanced colonies such as India and Malta have been given representative legislatures with control over a few ministerial departments, a system called "diarchy." Colonies fully able to govern themselves have been given responsible government—a local ministry responsible to a local parliament, the Crown being represented by a Governor or a Governor-General who is now a figurehead as far as domestic affairs are concerned. This policy is followed in the five Dominions, the Irish Free State, and Southern Rhodesia. Wherever possible, British colonial policy has avoided the type of government set up by the United States in the Jones Act. This is likewise true of French colonial policy, for in only two French colonies—Cochin-China and Senegal—is a representative legislature to be found.

IV

In view of the defective principle upon which the present government of the Philippines is based, it must sooner or later be changed. The United States must either cripple the present powers of the Philippine Legislature or give it control over the administration of domestic affairs. This fact was recognized by the Wood-Forbes Commission which recommended that in case of deadlock between the Governor-General and the Philippine Senate over appointments, final decision should rest with the President of the United States—which in effect would mean the Governor-General. This fact has also been recognized by the *Manila Times,* an American newspaper, which has adopted the slogan, "Govern or Go," and by the Philippines Chamber of Commerce which, in resolution of August 1920, and November 1923, advocated the repeal of the Jones Act and the placing of the Philippines under a territorial form of government.

Great pressure is being exercised by business interests in the United States and the Philippines to abolish the autonomy granted

in 1916. This pressure will increase with the deadlocks which are bound to arise in the future. But in determining whether the United States should reverse its Philippine policy, the promises which we have made to these islands cannot be ignored. We cannot afford to add the sin of hypocrisy to that of imperialism. Before 1914 England had made some seven promises to get out of Egypt—promises which she failed to keep. She finally recognized the independence of Egypt in February 1922, but only after a revolution which made her position there intolerable. As President Roosevelt said in 1915, we cannot taint our work in the Philippines with bad faith. In June 1922 President Harding promised the Philippines that "no backward step is contemplated, no diminution of your domestic control is to be sought."

Neither can we postpone the fulfillment of our obligations by saying that the Filipinos do not want self-government and that their leaders do not represent the wishes of the people. Aguinaldo's three-year resistance to American troops in a war where 11,000 Filipinos lost their lives, showed their original attitude toward our rule. One of the first acts of the Philippine Assembly, created in 1907, was to express a desire for independence. All of the Philippine commissioners sent to the United States have advocated independence. Since the war, three independence missions have been sent to America. So strong did independence sentiment become that the Federal party gave up its demand for eventual statehood in 1907, while the party itself disappeared in 1914. Although the Democrata party opposes bitterly the present coalition of Nacionalistas and Colectivistas, all three parties are pledged to immediate independence. The sentiment of the people was shown in the senatorial election this October in Manila, where a Nacionalista candidate won a 15,000 majority over a Democrata candidate on a pro-Wood platform, although Manila is ordinarily a Democrata city. This sentiment was also shown by the unanimous adoption of a resolution of the House of Representatives, supporting the action of the Philippine leaders in the Conley affair. Perhaps the most effective answer to those who believe that the *politicos* do not represent the wishes of the people was given by the Wood-Forbes Commission, itself unfavorable to independence, when it declared, "We find everywhere among the Christian Filipinos the desire for independence, generally under the protection of the United States."

As stated in the Jones Act, the United States is under no obligation to grant the Philippines independence until a "stable" government is established there. But there is a great danger that in determining this question, we exact a test in the Philippines which we do not

apply to ourselves. Some people regard the failure of the Philippine National Bank, with losses of $37,000,000 during six years, as proof that a stable government does not exist in the Philippines. While undoubtedly the bank was mismanaged, mismanaged banks have been known to exist in the most "stable" governments in Europe and America. In the case of the Philippine bank, some money was embezzled, but the guilty officials have been punished, three members of the Conception family now being in jail. It is only fair to say that the Americans were as responsible for the management of the bank as Filipinos and that the loans were made to Americans as well as to Philippine business men. The great losses of the bank were due to the rapid economic readjustments following the World War, which adversely affected banks the world over. This October General-Manager Fullington, of the bank, declared that it had made a profit of a million dollars in the last three months and that it was in better condition than it had been for many years.

In addition to entering the banking business, the Philippine Legislalature has also purchased the Manila Railway, chartered the National Coal Company, the National Iron Company, the National Cement Company and organized the National Development Company, for the purpose of engaging in any commercial or agricultural enterprise necessary for the public welfare. Aroused by these activities, Governor-General Wood and Secretary-of-War Weeks have demanded that the Philippine Government "get out of business." While as a general rule government management may be less efficient than private management, the Philippine people are confronted with an entirely different situation than the people of the United States. Foreign capitalists and entrepreneurs may have developed the resources of China, Persia, and Turkey more "efficiently" than the domestic governments. But this type of exploitation has inevitably led to foreign political and economic control, the rewards of which have gone to foreign bondholders. If Governor-General Wood should succeed in getting the Philippine Government "out of business," and if he should succeed in securing the repeal of the Public Lands Act of 1919, which limits agricultural leases by Americans to 1024 hectares of land, Americans would inevitably gain control of the great resources of the islands, because individual Filipinos do not now possess the capital necessary to develop these resources. Once American capital becomes entrenched, the prospects for Philippine independence will become more remote than ever.

In interpreting too rigidly the term "stable government," a great injustice may be done to the Philippine people. Upon a number of occasions, General Wood has frankly defined such a government as

"one under which capital seeks investment at normal rates of interest." In a capitalistic age, this definition may be reluctantly accepted. But when he goes further and implies, as he did in an address before the Philippine Columbian Association in June 1921, that a stable government must be capable of defending the Philippines against attack, he is exacting a standard which few governments in the world could meet. That such a standard should be exacted was implied also by the Wood-Forbes Commission when it stated, "We find that the people are not organized economically or from the standpoint of national defense to maintain an independent government," and "that the experience under the Jones Act did not justify withdrawing the Army and Navy of the United States" and "leaving the Islands a prey to any powerful nation coveting their rich soil and potential commercial advantages." According to such a test, the existence of Belgium, Greece, or Switzerland would not be justified. If the Philippines are required to meet this typically military standard, it is safe to say that they will always remain an appanage of the United States.

At the Washington Conference, the United States expressly repudiated this standard when it agreed, in the naval treaty, not to increase its fortifications in its Pacific possessions. This promise leaves the Philippines without adequate bases and fortifications—defenseless from attack. But in place of these military guaranties, the United States accepted a moral guaranty that neither Japan, Great Britain, nor France would attack these islands. In the Four Power treaty these governments agreed to "respect their rights in relation to their insular possessions and insular dominions in the region of the Pacific Ocean." Of course, this treaty would not protect the Philippines should they become independent. But there is no reason why the four Powers should not renew their promise in the case of an independent Philippines, by means of a joint neutralization agreement, such as the Democratic platform of 1912 proposed, or such as Senator LaFollette suggested as an amendment to the Four Power treaty. Failing such a treaty, a declaration by the United States that it "will consider any aggression against the territory" of the Philippines as an act to be repelled with all the means at its command, would safeguard the independence of the Philippines more effectively than an oceanful of battleships.

In the face of the promises made by the United States to the Philippine people and in the face of the wishes of these people, there is only one important reason why so many Americans are now demanding that we cling to these islands: that is, in order to advance the interests of a limited number of American business men. The American people as a whole have derived no material advantage from

our occupation of these islands. The Philippines have not contributed a cent to the treasury of the United States. We have sunk at least $700,000,000 in military and naval expenditures arising out of the occupation. And we even turned back to the Philippine treasury the duties collected before 1913 on rice, sugar, and tobacco, imported into the United States from the Philippines. In 1920 the United States returned to the Philippines internal-revenue taxes amounting to more than one and a half million dollars, collected on Philippine products. Whatever profit has arisen out of this colonial venture has gone to a few business interests.

Under free competition, the American consumer would be benefited by the activities of American business abroad. But in case this business is a monopoly, the consumer loses more than he gains. The worst feature of our Philippine policy is that it has tended to establish an American trade monopoly, by following the policy of the "closed door." The treaty of 1898 guaranteed to Spain the "open door" in these islands for a period of ten years. And in his instructions to the American commissioners, President McKinley said, "We will seek no advantages in the Orient which are not common to all. Asking only the open door for ourselves, we are ready to accord the open door to others." Unfortunately this promise was violated at the end of the ten-year period, and by the tariff acts of 1909 and 1913 free trade was gradually established between the United States and the Philippines, but a tariff was rigorously applied to all outsiders. An American business man ships his goods into the Philippines without the payment of the duty to which a Japanese merchant is subjected. Between 1902 and 1913 certain export duties were also levied on Philippine products, but these were remitted in case the products were to be consumed in the United States. The Merchant Marine Act of 1920 empowered the President of the United States to bar foreign ships from the trade between the United States and the Philippines, a power which no President has yet exercised because of the opposition of the Philippines to this extension of the closed door.

As a result of this policy, America's share in the Philippine trade has increased from thirteen per cent in 1894 to sixty-one per cent in 1921, while the share of the trade carried by American ships has increased from less than four per cent in 1909 to thirty-two per cent in 1919. If the Philippine export industries were owned by Filipinos, the Filipinos would benefit from the closed door as much as American merchants. But as a matter of fact the export trade of the Philippines is very largely in the hands of American capital, which consequently profits in two ways from the closed door. As a result of our economic policy, American business has been given a political

advantage, which it is naturally afraid lest independence, bringing with it "most-favored nation" treaties, may remove. If this trade were of any immediate advantage to the American people as a whole, there might be a materialistic reason why they should support the opposition of business interests to Philippine independence. But any trade carried on under the closed door tends to be a monopolistic trade, which means higher prices both to the American and to the Philippine people, for the gain of a few men. If Japan and other neighboring countries could freely trade with the Philippines, there would be no economic reason why these countries should want to annex these islands. But as long as the United States maintains the closed door, these countries are confronted with a political obstruction to very rich markets, which in the future may lead to international complications of a very serious nature. The United States cannot afford, whether from the stand-point of Mr. Man-in-the-Street, or the Filipinos, or of world peace, to have its Philippine policy dictated by the Manila Chamber of Commerce, or even by the Americans in the Philippines who constitute one tenth of one per cent. of the population.

V

The present system of government in the Philippines must be changed one way or another. Business conditions in the islands will always be uncertain and investments will always be deterred, until the political status is definitely fixed. If this country follows the advice of the military men—who are now handling our Philippine policy—or of a few capitalists, it will deprive the Philippine Legislature of some of its powers, if not of its existence. But we cannot take this backward step without violating the solemn promises made by every President since McKinley and without violating the preamble of the Jones Act.

During the last four years, the British Empire has terminated its protectorate over Afghanistan; recognized the independence of Egypt and Mesopotamia, subject to certain restrictions on finance and foreign affairs; granted full self-government to Ireland and a less extensive responsible government to Southern Rhodesia; bestowed semi-responsible government upon India and Malta; and promulgated new constitutions in Ceylon, Burma, and Nigeria. The same development has taken place in French Tunis and in Senegal, which was given a parliament in 1920. In 1919 Italy established parliaments in Tripoli and in Cyrenaica, while in the Dutch East Indies a *Volksraad* has been formed, more than a third of the members of which are natives. In face of this trend in the government of colored peoples,

the United States would assume a heavy responsibility if it curtailed the rights granted the Philippines in 1916. But if it does not curtail these rights, it must extend them.

It is neither necessary nor desirable to grant the Philippines complete independence at this time. It is possible to follow the British policy of Home Rule which would encourage the formation of a Philippine ministry responsible to a Philippine parliament, the American Governor-General exercising only advisory power—except in foreign affairs. It is possible to grant a qualified independence to the Philippines, subject to American protection or to an international neutralization agreement, which the entrance of the Philippines into the League of Nations would secure, if no more definite agreement is possible. But no power will guarantee the independence of the Philippines without some assurance that it will live up to its international obligations, particularly in regard to the payment of foreign debts and to the protection of the lives and property of foreigners. No power will accept a position toward the Philippines of "responsibility without authority."

If its independence is guaranteed by international agreement, the Philippines could give this assurance by consenting, in case of default, to some type of international financial supervision, such as the League of Nations has established over Austria, and also to the employment of financial and other experts in order to prevent such defaults from occurring. If the United States undertakes to protect the Philippines alone, the most practicable way to defend our interests and to satisfy Philippine aspirations is by an agreement similar to our treaty of 1903 with Cuba. An agreement could be entered into between the United States and the Philippines in which we recognize their independence, subject to the following restrictions: the Philippines shall never make a treaty which might impair their independence; they shall not contract any debt which cannot be met by ordinary revenues; the United States may intervene for the preservation of the independence of the Philippines and the maintenance of a government capable of protecting life, liberty, and property.

Such was the solution of the Cuban problem, which we adopted in 1903. Yet we have delayed twenty years in applying the same solution to the Philippines. Of course, it would be more difficult to intervene in the Philippines 7000 miles away than in Cuba only a few hours away from our shores. Yet the physical objection to this solution is many times outweighed by the necessity of clearing up a situation which will steadily grow worse—clearing it up through a means which will maintain the honor of the American people,

satisfy the wishes of the Filipinos, and at the same time protect the legitimate interests of the outside world.

53. TERRITORIAL EXPANSION SUCCEEDED BY ECONOMIC EXPANSION[1]

By Isaiah Bowman

With the United States rounded out from ocean to ocean there was no longer opportunity for territorial expansion of the type that had marked our history for over half a century. From the time of the Mexican War down to 1898, also more than half a century, there was no important territorial acquisition save Alaska in 1867; and that territory was too distant to serve any nation as a basis of imperial designs. Though it has had a great development fully justifying its purchase, it was long a relatively poor possession. With few exceptions its products, such as timber, fish, ores, were those that could be obtained nearer the seats of industry in the United States. It was natural therefore that our greatest development should be toward the tropics. With title to all the Caribbean lands established, there was no chance for a change of ownership until the war with Spain in 1898. Thereafter we stood deep in the midst of a host of new problems arising from the fact that we had become at one stride a colonial empire. Following a sudden and national burst of enthusiasm we bought the Philippines and gained perpetual dominance in the affairs of Cuba (Platt Amendment); Porto Rico became ours, and a few years later the Canal Zone also, with which we acquired certain rights of protection and semi-sovereignty that give us control of Panama. Our latest acquisition was the Virgin Islands, purchased from Denmark in 1917 for $25,000,000.

Our economic interests have been extended much farther. Almost every mining center in South America and Central America, every oil field, every public service in need of foreign capital, has felt the American influence. It could not be otherwise. With capital to spare, with a mounting need for tropical products, and with geographical position in our favor, it was entirely natural for us to enter and develop the Latin-American field. In this field, however, we entered not a practically empty wilderness, as when the pioneers pushed our frontier westward, but states organized on modern lines and with at least nominally democratic forms of government. Every importation of capital in such a case sets up all sorts of complex reactions. It

[1] Reprinted from *The New World and Supplement*, World Book Co., Yonkers-on-Hudson, N. Y., by permission of the author and publishers.

affects the social life, it arouses jealousies and fears, it invokes the idea of aggression and deep-laid territorial designs, and it lends itself to real exploitation and the sense of wrong that follows exploitation even among primitive people. Added to these barriers to friendship are the wide-reaching effects of contact between different races and civilizations.

Though the management of its relations to Latin-American nations is one of the greatest problems of the United States, no headway at all has been made toward its basic solution, with the single exception of our extension of the benefits of public hygiene through the medical service of one of our largest philanthropic foundations. Successive national administrations take up the Latin-American question only to end with an official visit and much trumpeting forth of good will. If the present processes continue unchecked, we shall have the case of Mexico repeated in other countries where we are making heavy investments. And with every increase of distance the problem of force (such as we have used in Mexico) is so much the more difficult. Investment made regardless of the soundness of the social and political life of the country involved is gambling, not business, unless—as in the Caribbean or in Central America—particular business ventures are made dependent upon loans guaranteed by treaty with the United States, in which case the business itself is abnormal. Our government should be studying the land question everywhere in Latin America, for this is fundamental to the whole social structure of the people. If the people own less and less of the land it is only a question of time until they take it back by force or by changing the fundamental laws, which amounts to the same thing. In the resulting revolution the foreigner loses like the native. Moreover, if the government in a given instance is a military dictatorship in fact, it must be recognized that it may be displaced at any time and that the rules and laws affecting property rights may even change as frequently as the administrations. Adopting a new constitution is often not the orderly process that we see in the United States. It is in such questions that our diplomatic representatives should engage themselves so that storm warnings may be identified and rightly interpreted. No fundamental study of Latin-American problems has yet been made by any branch of our government. We have dealt so far only with manners, the amenities of life, and the opportunities to do a profitable business.

The views of many Latin Americans are more nearly constructive. Le Breton in Argentina and T. Esquivel Obregon for Mexico have studied the deeper currents of national life that are involved in the question of ownership and use of the land. A modern and con-

structive study of the same type has also been initiated by the American Geographical Society of New York. The conclusion drawn from each study is the same: when the land question is rightly settled a sound social and economic super-structure may be reared. Land ownership and the social structure are not questions for the Latin-American scholar alone: they should be studied in the United States. Our interests bring us to the doors of Latin America as the strong and dominating power, and it is our behavior toward the Latin Americans that will be the subject of world discussion, not their shortcomings toward us.

THE CARIBBEAN LANDS

Our economic advance into the West Indies was notable before the Spanish-American War in 1898; but the rapidity of the movement was greatly hastened by that event, until today we have been brought into the closest political relations with Caribbean lands because of our widespread investments and our entire scheme of naval defense. . . . The part we played in freeing Cuba gave us the opportunity of inserting in her constitution the Platt Amendment as a condition precedent to the ending of American military occupation. By its terms (disregarding the conventional words we employ in describing our relationship) Cuba is virtually a protectorate or dependency of the United States, since we have construed the amendment to give the United States the right to intervene in case of disorder and to exercise supervision of the elections and finances of the island in case of need; and we reserved to ourselves by agreement with Cuba the right to lease lands necessary for coaling or naval stations, including a first-class naval base at Guantanamo Bay, where the winter manœuvres of the Atlantic fleet are regularly held.

In similar fashion we participated in effect, if not in name, in securing the independence for Panama in 1903, with the consequence that the cherished American plan of building an interoceanic canal was at last realized, the way having been cleared by the Hay-Pauncefote Treaty of 1901. By treaty with Panama we secured the right to construct and own a canal across the Isthmus of Panama and to own a strip of territory measuring ten miles wide from ocean to ocean exclusive of the cities and harbors of Panama and Colon, which lie within the boundaries of the zone.[2] The United States also reserved, as in the case of Cuba, certain rights as a protecting power. They relate to the election laws, to the policing of Colon and Panama and

[2] The boundaries of the Canal Zone were subsequently modified in detail in several places, as about the border of Gatun Lake, for example.

the management of the sanitary establishments of those cities, and to the fortification of strategic points at either end of the canal, particularly the Pearl Islands in the Bay of Panama. Porto Rico we acquired outright as a result of the Treaty of Paris (1899) terminating the Spanish-American War, and by agreement we first supervised the customs (1905) and then occupied the country (1916) in Santo Domingo, and also in Haiti, supervising the police arrangements of both countries, mapping portions of the territory, building roads, administering the customs and foreign relations, and maintaining occupying forces of marines.

Parallel with these political developments there has been a great economic development in a coastal strip of fruit lands about the border of the Caribbean and also in the railways, oil fields, and mines. Our penetration of this broad belt of tropical country by outright ownership, by lease, by concession, by economic development, and by the extension of strategic plans, has contributed to building up what is in effect an American policy with reference to the Caribbean. We regard it as a region in which we have paramount interests; and it follows, whether rightly or wrongly, that we look upon all political and international relations that affect the Caribbean as matters of primary interest to the United States and feel that our rights must at all times be taken into full consideration.

We have done these things, not because our government or people at any time formulated, or at any rate expressed, a well-defined policy of political or economic penetration generally accepted and consistently followed. We have taken one step at a time along the line of natural development and in the light of the circumstances surrounding each particular territory and episode. Secure as this statement undoubtedly is, it is equally true that from the outside the whole picture has at times presented a quite different aspect, because the effect of our advance has been cumulative and the advance itself has been steady. Moreover, it is obvious that the process is a continuing one so long as the United States increases in population and resources and has the national energy to press out into new fields of economic development. This makes it seem to the foreigner that there exists a settled American policy of advance into the Caribbean and of increasing political control. To the Caribbean republics also, the future appears filled with unpleasant possibilities of repeated occupation.

Geographical proximity to the United States has made it possible for us—indeed, has in a sense impelled us—to do these things; for the Caribbean region lies at our threshold and on the sea route between our eastern and western coasts. The economic attraction

which the United States exercised upon these rich lands is an illustration of what amounts to a natural law. Certainly a nation can not be expected to forego the advantage that proximity brings. If we apply this principle in the case of America we are also required to recognize it wherever else it is illustrated upon the political map, and with respect to countries in competition with us or in opposition to us no less than with respect to countries in which we have no commercial interest at stake.

To accept this principle is not to close one's mind to the manner in which the penetration of near-lying lands is effected. The important thing in our relation to the lands of the Caribbean is not that we are there, but how we got there and how we are comporting ourselves. We have a duty toward independent governments, and it consists chiefly in recognizing possibilities of real self-government on their part and helping in their development. Unfortunately it is just in these lands that there is going on today the most severe test of democratic government in the western hemisphere. An intelligent electorate does not exist in some of the political groups. It is a fact, indeed, that certain populations have retrograded. Haiti is a black republic and its government has devoluted to the point where the United States by treaty in 1915 felt itself obliged to take over the management of the financial and military affairs of the country. The structure of Mexican life has been badly shaken by revolution and financial disorder. Yucatan is essentially an independent state with socialistic practices and a strong communistic tendency. Santo Domingo was heading toward financial chaos and civil war before the American occupation in 1916. We are perpetually involved in the internal affairs of Nicaragua and Honduras because of revolutions that affect American financial investments and government loans guaranteed by treaty.

This is not the place either to praise or to condemn our course of action in particular instances. Moreover, it is not the detail of a given instance that is of chief importance in connection with our foreign relations. It is rather that the total effect of our occupation and penetration has been unfavorably viewed by the larger and more advanced of the Latin-American states. Not only does this make it difficult for us to participate in the development of South American and Mexican resources, but it gives the Caribbean peoples themselves an assurance of moral support from men of like tradition elsewhere in Latin America and, they would like to think, from men of their own race. But it is not really a question of race, for the peoples of the Caribbean are all shades of color. The Spanish element is distinctly limited, the foreign element small, while the Indian and Negro

elements, if we count the blends as well as the pure stock, are in many places large and in some places dominating. The right to have a poor government, if they choose to have one, is the basis of much of their opposition to American occupation. Yet the United States cannot stand by and let investments of European capital go unsecured and bankruptcy be brought about. Questions of territory and of special privileges and concessions would inevitably arise, and the vital interests of the United States would be endangered. War must be the outcome of such a course: we saw ourselves pushed to the verge of it (1895–1896) in the dispute with Great Britain over the boundary of Venezuela and British Guiana.

That this line of political thought corresponds with one of the natural economic tendencies of American capital should not blind us to the fact that national safety is as real a consideration to the American people as commercial opportunity. The importance of the shortening and cheapening of the transportation service from the western coast of the United States to the eastern is recognized, and the necessity of protecting our fifteen hundred miles of Pacific coast, situated far from eastern industrial fields and centers of population, is appreciated by every thoughtful citizen. We cannot believe that these vital economic and strategic considerations should be lightly treated even if they are involved in subtler questions of economic imperialism and the rights of small backward independent states, some of which seem to be incapable of managing their own affairs.

54. HOW WASHINGTON IS GOVERNED[1]

By Daniel E. Garges

The present form of government was provided by an act of congress approved June 11, 1878. This government consists of three commissioners, two selected by the President of the United States from actual residents of the District of Columbia who have been residents for three years, and an army officer detailed by the president. Their term of office is three years. These form a board of commissioners and this board has duties corresponding to that of a mayor.

The Constitution of the United States provides that congress shall exercise exclusive legislative power over the District of Columbia, but congress by various statutes has delegated to the commissioners the power to make police, building, health, and other municipal regula-

[1] Reprinted from the *National Municipal Review*, October, 1923, by permission of the editor.

tions, and to enforce them by proper penalties. There are some duties, however, which ordinarily come under the jurisdiction of municipal authorities which the commissioners do not have. The situation arises by reason of the fact that Washington is the capital of the United States. For instance, the United States authorities have charge of the water supply system including the bringing of the water from the Great Falls to the filtration plant and filtering it. All water mains supplying the inhabitants of the city with water, however, are constructed by the commissioners, and all water, whether furnished to the citizens or to the property of the United States, is distributed under the jurisdiction of the commissioners. The United States also has jurisdiction over all public parks.

The board of education of the District of Columbia is appointed by the judges of the supreme court of the District of Columbia, and the Board of Charities, the recorder of deeds, and the judges of the municipal court are appointed by the president of the United States. The commissioners, however, appoint the heads of all the various municipal departments in the District government, and also the employees of the District government. These employees do not come within the provisions of the civil service laws, with the exception of the police and fire departments.

One of the duties of the commissioners is to submit annually estimates of funds necessary to support the government of the District of Columbia. These estimates are submitted to the director of the budget in the treasury department, and as they are approved or changed by the director they are submitted to congress. In both the house of representatives and the senate there are appropriations committees and a subcommittee of five members which has charge of preparing the District of Columbia appropriation bill. The bill is first prepared in the house of representatives, and during its preparation the commissioners are granted hearings, in order to present to congress the necessity for appropriations asked. The subcommittee prepares the bill and it is sent to the house of representatives. After it is passed by the house, it is referred to a similar subcommittee of the senate appropriations committee, and this committee also grants a hearing to the commissioners. It frequently adds by amendment to the amount of the bill allowed by the house. The senate then passes the bill with the amendments. The bill is then referred to a conference committee consisting of three members each of the house and senate subcommittees. The conference committee makes its report to the house and senate. The bill is passed, and when signed by the president it becomes a law.

All legislation for the District other than appropriations comes

under the jurisdiction of a committee of the District of Columbia, of which there is one in the house and one in the senate. Whenever the commissioners desire to have a law passed they write to the chairmen of these committees recommending the introduction of a bill to accomplish what is desired. These committees consider such requests and if they favor the measure they report it to the house and senate, and when passed by these houses and signed by the president it becomes a law. All bills relating to the District of Columbia, by whomsoever introduced, are referred to these committees.

All funds appropriated for the expenses of the government of the District are paid from two sources. These sources are:

1. Taxation on real estate and personal property of the residents, including street railways, gas companies, and other public utilities, and certain license taxes imposed by law on various businesses.

2. Money in the United States treasury belonging to the United States.

When the present form of government was established in 1878, the law provided that one-half of all appropriations made for the expenses of the District of Columbia should be payable from taxes levied on the residents of the District, and the other half from funds in the United States treasury. Under the law as it now exists, however, it is provided that 60 per cent. of such appropriations shall be paid from taxes levied in the District, and 40 per cent. from funds of the United States. Prior to July 1, 1922, taxes on real estate were levied on the basis of a two-thirds valuation, and on personal property at full valuation. Now taxes on both real estate and tangible personal property are based on a full valuation. The rate fixed for the fiscal year beginning July 1, 1923, is $1.20 per $100 on both real estate and tangible personal property. For the preceding fiscal year it was $1.30 per $100. On intangible personal property the provision of law requiring a tax of three-tenths of one per cent. was increased on July 1, 1922, to five-tenths of one per cent. The law provides that the commissioners shall fix the rate of taxation to meet the proportion of the expenses of the District to be paid from this source. Taxes were formerly payable annually, but beginning July 1, 1922, they were payable semi-annually on November 1 and May 1 of each year.

The assessed value of real estate and personal property in the District of Columbia on June 30, 1923, was:

Land	$335,538,719
Improvements	387,660,549

Personal Property:

Tangible	123,765,372
Intangible	365,079,089

Real estate is assessed biennially.

For the purpose of providing for the orderly conduct of the business of the District government each member of the board of commissioners is appointed a committee of one to handle certain municipal functions. One commissioner has charge of the assessment of property, the disbursement of appropriations, the licensing of businesses, the collection of taxes, the handling of legal matters and insurance, and the purchase of all materials and supplies, and the control of the alms-house, reformatory, and workhouse. Another commissioner has charge of the fire and police departments, the supervision of weights, measures and markets, the supervision of play-grounds, etc. Another commissioner has charge of all street improvements, the construction of school and other municipal buildings, the removal and disposal of garbage and city refuse, the construction of sewers, and cleaning of streets, the lighting of streets, the laying of water mains, the care of street trees, etc. Twice each week and at other times when necessary, the three commissioners meet in board session. Each commissioner brings before the board matters affecting his department, and the board passes such orders and regulations as they deem advisable covering the matters brought to their attention. These orders are signed by the secretary to the board of commissioners, and are issued to the heads of departments for execution.

In addition to the duties which the commissioners have as executives of the District government, congress has placed upon them certain other duties. The three commissioners form a public utilities commission with jurisdiction over street railways, gas and electric companies, telephones, baggage transfer, etc. The commission fixes the rates which may be charged for all of these commodities, and the public utility companies cannot charge more than these rates for services which they render.

The commissioners, together with the architect of the capitol and the officer in charge of public buildings and grounds in the city of Washington, form a zoning commission which divides the city into zones, which can be used only for residence purposes, business purposes, and other commercial purposes. They also fix the height to which buildings can be erected and the area of ground which can be built upon.

All matters with reference to the public school system, with the exception of the construction and repair of school buildings, are placed by law under a board of education consisting of nine members appointed by the judges of the supreme court as heretofore stated. The board of education appoints all the teachers and other employees and makes rules for the operation of the school system. The expense of running the schools is one of the municipal expenses cared for in the District appropriation act.

It may be interesting to note the various taxes and assessments which the property owner in the District of Columbia is called upon to pay. When the city of Washington was laid out into streets, avenues, and alleys, the old boundary of the city was Florida Avenue. As the city grew, however, property owners outside this boundary subdivided their land into lots, and dedicated streets. These streets as well as the city streets were improved at the expense of the District government and no assessment was made for such improvement. In the year 1893, however, congress directed the commissioners to prepare a plan for extending the streets and avenues of the city throughout the entire District, in order that when the land was opened for building houses the streets would be run in a systematic manner. The law provided that if a property owner wished to subdivide his land he must dedicate the streets to the District without any cost. If he did not dedicate and the commissioners desired the streets to be opened, they would institute a proceeding in court to take the land for street purposes, and the property owners were required to pay the cost of the land taken. After the street was opened, it was necessary to lay sewers, water and gas mains, and electric lights, and also to provide sidewalks and roadways. With the exception of the gas and electric light, the property owner is required to pay for all these improvements. Now he pays two dollars per front foot for a water main, and one dollar and fifty cents for a sewer; one half of the cost of laying a sidewalk; one-half of the cost of paving alleys, and one-half of the cost of paving the roadway in front of his property. This is in addition to the taxes he pays each year on the property.

The District of Columbia has practically no bonded or floating indebtedness.

On June 30, 1923, the outstanding 3.65 per cent. District of Columbia bonds amounted to $4,589,250. The sinking-fund assets amount to $4,423,640.91, thus making the net indebtedness of the District of Columbia on June 30, 1923, $165,609.09. The District of Columbia has no other form of indebtedness than that represented by its outstanding 3.65 bonds. The 50-year period for which these

3.65 bonds were issued, the issue being limited by law to $15,000,000, will expire August 1, 1924. The sinking-fund assets, represented entirely by investments in bonds of the United States, will be nearly sufficient to take up the outstanding bonds.

Beard, (4th Ed.), pp. 430–441.
Kimball, *National Government*, pp. 574–592.
Ogg and Ray, (2nd Ed.), pp. 532–551.

XIV

CONSERVATION

The movement for conservation in the United States began when national attention was directed to the possible depletion of our natural resources within a short period of years. To Theodore Roosevelt, in particular, credit is due for dramatizing the need for conservation in such a way as to stir the national consciousness. Congress passed a series of laws, state conservation commissions were created, and the World War added a further impetus.

The lateness of the movement is not a reflection upon the judgment of our people, but rather it is one of the inevitable situations which arise in a new country. The vast natural resources of the country had been, since the arrival of the first settlers, a problem to be solved rather than a mere question of saving. Waste in timber, minerals, water-power, and land was inevitable when just beyond were thousands of acres waiting for clearing and for settlement. So long as a frontier existed, a policy of conservation was unnecessary; but such a policy requires vision, and this attribute rarely appears in the midst of plenty. The difficulties of enforcing the policy enunciated by Roosevelt have been great, for in many instances public officials have been slow to see the need of conversation so long as one acre of timber remained standing or one acre of land unexploited. National waste is one of the sins of democracy, and conservation involves restrictions on personal liberty.

The conservation movement has been retarded by private exploiters who seek quick profits from natural resources without due regard for the greater rights of society as a whole. The second stage of the movement in now under way, aiming to prevent the waste incident to the use of natural resources which have been long in the possession of private capital, such as coal, iron, and timber. To put such a policy into effect, a second great movement is necessary—the creation of a due regard for future generations. To argue that they will find a way to solve their own problems, is to avoid the issue. The tragedy of waste must be carefully instilled into the consciousness of America in order to make real the policy initiated by Roosevelt.

55. THE TRAGEDY OF WASTE

THE WASTE OF NATURAL RESOURCES [1]

By Stuart Chase

Wealth, in the terms of immemorial economic usage, is derived from labor applied to land. Nearly everything except personal service which we consume is the result of raw material fashioned and shaped by human energy, or by machines which human energy has created. We have seen in the foregoing articles (this article was the fourth of a series which appeared in the *New Republic*) something of the waste of energy. It remains to inquire into the waste of land—land in the broad economic sense of all natural resources: minerals in the ground; forest and animal life above the ground; fish in the seas; soils; streams.

What we do here is but to run a rough chain and compass line over the findings of the conservation movement—a movement still a living force, but somehow strangely shrunken from the great days when Roosevelt was its King Arthur, and Pinchot its Lancelot. That high adventure into waste has had its enduring results, lances have been shattered and foemen unhorsed; but on the whole the embattled front of sturdy individualism has not been broken. One lumber king or one coal baron is still good for any ten conservationists. The day of the pioneer may have passed its noon, but it still runs strong.

It is not difficult to draw a heart-rending picture of the despoliation of a continent. The rape has been colossal and unparalleled in history. More difficult is the attempt to appraise the real economics involved, for, on analysis, the simple dramatic sequence breaks down into many baffling and confusing parts. If an Industrial General Staff had been written into the American Constitution with power to control natural resources in the public interest, enormous wastes might have been averted, but the drive of the pioneers westward would have been altogether a different (and, one fears, a tamer) phenomenon. It is doubtful if the arts of invention would have progressed so rapidly. The prospector, the speculator, the plunger, and the stark individualist have been woven into the whole fabric of the American cloth. Furthermore, the history of the material conquest of America largely parallels the history of every other rich and

[1] Reprinted from the *New Republic*, August 26, 1925, by permission of the author and publisher.

virgin area—Canada, Australia, South Africa. The momentum of such a conquest is impossible without waste—enormous waste—and it may be that the philosophy which has been applied to standardization in general is roughly applicable here. Free experimentation, proliferation, trial and error; then as the stable forms emerge from chaos, order and standards. But somewhere this mad dance of destruction must abate.

So far as human energy is concerned, it is probable that "skimming the cream" from coal and timber and oil has taken rather less effort to date than would have been required had Conservation been inaugurated with the Constitution. We have, here and there, actually saved some man-power by wasting raw material. This is a policy, however, which has its distinct limitations, and builds up meanwhile, as we shall see, an ever more serious bill of damages against the labor power of the future.

Of course, it is conceivable that tomorrow or next day some new invention may revolutionize the whole case against waste in this category. If we could suddenly get unlimited cheap power out of the winds or out of the tides, the tears shed for devastated deposits of coal, oil and natural gas would be largely maudlin ones—though the problem of by-products other than power would still remain. Similarly, cheap nitrogen from the air would cause us to forget the ravages of the soil. Just what are we to do for timber, however . . . ? Invention, we are ready to admit, may knock the bottom out of much of the case for wasted raw materials—but such inventions are still in the womb of time, and to date the indictment stands.

There seems to be a fairly clean-cut distinction between those natural resources, which, once used, are gone forever; and those which may be revived through more careful methods of exploitation. In the first class fall such inorganic substances as coal, oil, natural gas, mineral deposits, marble quarries, and so forth; in the second, organic substances like forests, crop handling, fur-bearing animals, fisheries, and the like. Water power stands somewhat in a class by itself; it is a potential resource, the technique for whose development is fully known, and waste arises because this technique is not applied.

"The world has used more of its mineral resources in the last 21 years than in all preceding history. The per capita consumption of minerals has increased seven-fold since 1900." While we have not mined 2 percent. of our original supply of coal in the United States, we have exhausted 33 percent. of our highgrade beds. There are only limited reserves of low volatile smokeless coals, and high volatile gas coals are being rapidly exhausted. We have huge reserves of

iron ores, but the high grade deposits "have the possibility of being exhausted at a comparatively early date." It is probable that if "business were to catch its stride through the whole world, and normal advances were to be made, we would see the practical end of copper mining in the United States within the present generation." Of oil, there remains in the ground (in 1921) about 9,000,000,000 barrels, or "only enough to satisfy our present requirements for 20 years." Meanwhile requirements, particularly for motor trucks, oil-burning ships, and aeroplanes, are on the increase. We have exhausted more of our oil reserves since August, 1914, than in all previous years! The peak of natural gas production has been passed, the supply diminishes, and so the chapter of this "wonder fuel" draws to its close. Thus Floyd W. Parsons, editor of the Gas Age Record, sums up the situation in respect to the major inorganic natural resources. Messrs. Gilbert and Pogue are equally explicit:

> For every ton of coal produced, our methods of mining have placed a second ton beyond recovery; for every 1,000 feet of natural gas turned out, a similar quantity has escaped (into the air); for every barrel of petroleum that has seen useful service, nine barrels have been wasted—our best and most convenient coals will be depleted in a few decades, half our petroleum is already used up, and over half our natural gas is gone.

Anthracite, or hard coal, need not detain us. These beds are a younger branch of the coal family, and time has not saturated them with the oils and the tars, the gases and the chemicals which give soft coal its peculiar value. Furthermore, the anthracite monopoly, however much it may have wasted the householder's money in high prices, has organized the engineering of the industry along reasonably efficient lines.

The total production of soft coal in the United States runs around 550,000,000 tons a year. No monopoly governs it; the winds of free competition blow through it; and it is, in the words of C. E. Lesher, "as unorganized as the retail grocery business." To mine the tonnage takes the labor of 600,000 men, but these are idle, on the average, one-third of every year. One mine in every three should never have been opened; the industry has a tonnage capacity from 30 to 40 percent in excess of annual coal requirements. Of the tonnage produced, approximately 60,000,000 tons goes to the making of coke and the other by-products; 150,000,000 tons is used by the railroads to drive their engines; 50,000,000 tons is used for power generation in public utility plants, while the balance goes into power and heat for factories, and into house heating.

There are three main sources of preventable tonnage loss:

1. Bad technical methods underground.
2. Bad technical methods in steam raising and heating.
3. Failure to link the coal and water-power into regional super-power systems.

And perhaps even more serious still is the failure to salvage by-products. Untold riches in fertilizers, dyestuffs and chemicals are allowed to go up in smoke—their only function to increase the ugliness and laundry bills of our cities. The smoke nuisance is thus a knife with a double edge: we waste power, heat, and by-products in order to waste comfort, beauty and cleanliness.

Mr. Hugh Archbald, after long experience as a mining engineer, concludes that for every ton of coal brought to the surface, another ton is needlessly left in the mine; and that—if the technical arts of mining were fully utilized—one man, with no more effort, could do the work of four. Generally speaking, the underground layout is unplanned. A small mine has as many roads and turnings as a city of 25,000 people. Any industrial engineer can foretell the result of work so hopelessly unplanned. Slight supervision, loose organization, poor morale, mean tremendous inefficiency in winning the coal —the whole made worse by periodic layoffs and shutdowns. Meanwhile the accident rate per ton is three times the British rate, and hardly a month goes by without its mining holocaust.

The governing policy of working the big seams—"skimming the cream"—destroys the thinner seams in the process. Gilbert and Pogue conclude: "The tonnage of thin-seam and high-cost areas sacrificed in the process amounts to more than half the total coal produce to date."

Floyd W. Parsons tells of the 500 competing companies in the Central Pennsylvania fields, "when in the interests of efficiency, not over ten to fifteen companies—with central power and pumping stations—should be operating in large units."

George Otis Smith of the Geological Survey, after an exhaustive quantitative study of the existing coal reserve, concludes that the tonnage remaining in the great producing fields of the East is "so limited as to compel us to foresee their exhaustion." The Pittsburgh bed in Pennsylvania was thought good for thirty generations, but it will probably last only a single generation. The "Big Vein" in Georges Creek, Maryland, was thought good for 150 years. It is almost worked out. There is coal of sorts in the ground for hundreds of years to come—but unfortunately coal, like laundry work, is not all of one grade; there is good coal and bad coal.

Due to the wastefulness of steam-making, only 4 percent of the original ton is finally utilized. The combined losses aggregate 96 percent. Messrs. Huntington and Williams observe:

> The waste of coal is so enormous that where one horse-power or its equivalent in heat is really used, the consumption or waste of coal underground, on the railroads, and in the furnaces, is estimated as enough to furnish at least twenty horse-power and perhaps more! Part of this is inevitable, but certainly it might be cut in half.

George Otis Smith finds that the average steam plant uses eight times as much coal per unit of power generated as does the most efficient plant. That is, if the most efficient plant be given a score of 100 percent, the average plant operates in the neighborhood of 12½ percent effectiveness. The United States Fuel Administration pointed out in 1918 that 25 percent of all coal was lost through bad firing methods.

But power is not the only use for coal. In four minutes Henry Ford converts a ton of bituminous into 8,000 cubic feet of gas, 10 gallons of gasoline, 20 pounds of ammonium sulphate, 30 gallons of crude light tar, 3 gallons of creosote oil, 2 gallons of crude lubricating oil, 10 pounds of grease. And he has left 1,500 pounds of coke—either for steel making or for the finest kind of smokeless fuel. His coal costs him $5 a ton delivered; the market value of the above products is $13.56. Altogether there are upwards of a thousand different products to be secured by the destructive distillation of coal. Present methods waste most of them.

On the basis of a 500,000,000 ton output, Gilbert and Pogue conclude that current technical knowledge is available to *double* the number of horse-power now released, and to give the nation in addition 5,000,000 tons of ammonium sulphate (a splendid fertilizer); 1,000,000,000 gallons of benzol (a motor fuel as good as gasoline); 4,000,000,000 gallons of tar, as well as the requisite amount of coke for steel making.

If every drop of the annual rainfall could be converted into electrical energy, the total would just about equal the present consumption of energy derived from coal in the United States. Obviously only a fraction of the rainfall can be so converted through the power of falling water in streams, and thus we have to face the plain fact that "white coal"—water-power—can never act as a complete substitute for coal energy. What water-power can do is to diminish the annual amount of coal needed, and thus lengthen the life, and help to preserve the by-products, of the coal beds. Nature has favored this country, in that "regions distant from sources of coal

are all bountifully favored with water-power." This "balanced occurrence" is susceptible to the working out of great economies in the production and distribution of energy.

Scarcely 15 percent of the water-power readily available has been developed to date; and only 7 percent of that available, if storage reservoirs were introduced. From 80 to 90 percent of the horse-power to be freely taken from falling streams thus runs to waste. Why? Because it has been cheaper to skim the cream from coal and oil, with their relatively smaller capital cost per unit of horse-power.

Water-power may be introduced at isolated points into the industrial system to some advantage, but the great potentiality of the savings to be made from it are only realized through the coördinated planning of super-power systems where coal is locked in with water-power. "Giant-power" is one of the bravest and most exhilarating glimpses of Utopia which engineers and scientists have ever drawn. It not only saves coal and oil; it electrifies the railroads, lightens the traffic burden, abolishes smoke and soot and grime, runs cheap power to the farm and the country town, makes—as Ford makes—for industrial decentralization, for less congestion in the cities, for more life and vigor in the country. One's eye follows the sweep of the great high voltage lines as they charge the hill and dip to the valley—straight and true and infinitely powerful—and for an instant one glimpses the end of meanness, poverty, disorder; a world set free!

The potential horse-power to be readily derived from water in the whole United States is 60,000,000 and, as we have seen, only about 15 percent—or some 10,000,000—have been developed to date. Every additional horse-power saves ten tons of coal, and releases $100 worth of coal-carrying railroad equipment. Mr. F. T. Baum in his Super-Power Atlas has proposed that the country be divided into twelve super-power districts, connected by 220,000 volt transmission lines, power to be drawn from water and coal jointly on the balanced load basis—coal converted into energy at great central stations as near the mine as possible. He estimates that such a system would save 200,000,000 tons of coal a year; take 25 percent of all traffic from the railroads; rid the country of smoke; and release not less than 500,000 men from the mines, railroads, and other industries to function in more directly productive pursuits. Initially, of course, the labor so saved would have to go largely into building the dams and the transmission lines for the new system. In the end it would all be pure gain.

Under the spur of private initiative, hopes such as these tend to falter and die. No private capitalist or group of capitalists has the resources to engineer the project. It is the sort of thing which only

the whole community—the functional society—may attempt. It has been so attempted in Ontario, and it has worked. Super-power in Ontario cuts energy cost to about one quarter the private company rate.

Apart from by-products, what is the approximate waste in tons of coal mined per year? We have been assured that for every ton taken out of the shaft another ton is left unreclaimable below ground. If 500,000,000 tons are taken out in the year, it follows that 500,000,000 tons are annually lost in the underground workings. Of the 500,000,000 taken out, ineffective utilization wastes at least half. Gilbert and Pogue, for instance, have assured us that the energy content could be doubled. From which it follows that 250,000,000 tons more is wasted by reason of bad methods above ground. Granting Mr. Baum's super-power zones, a material addition might be made to this figure, but saving such addition as a margin of safety, it would appear that, in terms of the natural resource alone, the annual bill of loss is some 750,000,000 tons. And to this we must add the tremendous tonnage of unreclaimed by-products—ammonium sulphate, gas, tar, dyestuffs and chemicals. Is it to be wondered that Mr. Hoover has termed coal the "worst-functioning industry in the country"?

Petroleum, like coal, possesses a hideously wasteful technique for getting the product out of the ground, but unlike coal, its utilization, once it gets to the pipe line is, broadly speaking, reasonably efficient. From the pipe line on, standardization has set in, the pioneer has been barred, and the Standard Oil Company and its allies take charge of the job. There are wastes due to preventable evaporation, and wastes in securing a high gasoline content in refining, but as compared with by-product wastes in coal these losses sink into insignificance. What petroleum gains in this field, however, is quite gorgeously made up for in winning oil from the ground. For every ton of coal produced, another ton is needlessly left in the mine; for every barrel of oil produced three barrels or more are left underground, or wasted in well operation.

The engineer has worked out the technique for wasteless oil production, but beyond a few selected companies nobody pays any attention to him. "With the aid of geological methods, the development of petroleum fields may be changed from a gambling venture to an exact science. Instead of representing the most uncertain venture in the world, oil production can now be made as definitely an engineering project as the mining of a clay bank."

Petroleum collects in great underground pools. Over the top of

the pool gathers gas—valuable gas for two reasons: it has in it many of the properties of the oil itself; and only by its pressure downward on the surface of the pool may all the oil in the pool be pumped and driven above ground. Now the pool and the gas over it form a geological unit. To be efficiently exploited it must be treated as a unit. One engineering control should govern it, allowing only enough wells—reasonably spaced—to give the most effective outlet for the oil. Care must be taken to save the gas below in order to help the oil upstairs. Gushers must be resolutely choked; seepage and water infiltration must be guarded against; in brief, the known technical arts applied, and the job done aright. In this way it is possible for nearly all the oil in the pool to reach the pipe line—and in no other way is it possible.

No such procedure takes place under the American plan. A strike is made, land is staked out, lots are bought, and feverish drilling commences. There may be ten times as many wells as the pool can efficiently support, and the wells may be placed with no consideration for efficient exploitation. Gas is not controlled; seepage is not controlled; incoming water is not controlled; gushers are not controlled—nothing is controlled but the property lines around the lots. The owner drills as many wells as he can, as fast as he can, and preferably along the next owner's boundary line, in order to get the lion's share of the pool's activity. Thus the pioneer, with his stark individualism and his property laws which will not work with geological units, has succeeded in throwing away three barrels of oil out of four, while the engineer, who handles the geological unit with geological laws, could save the whole four barrels. As a result of our methods, about half the underground supply of petroleum in America is gone forever, and the balance, at present rates of demand, is estimated to last only from 13 to 20 years.

The total waste of the pioneer in the speculative production of oil will run at least three times the oil produced to date. The total output has been 54 barrels for every man, woman and child in the country today. Three times this is 162 barrels per capita thrown away—or over 16,000,000,000 barrels. If this 16,000,000,000 barrels were still underground, instead of a 13 years' future supply (more or less), we should be assured of at least a 50 years' supply. Natural gas is the history of oil over again.

The waste of an organic natural resource is not so serious in the long run as that of a mineral one. Organic things will grow again if nurtured and given time. Though our forests are devastated, a constructive policy might some day bring the forests back—save only

on those areas where flood and fire have carried away the underlying soil. Animal life may be revived, fisheries restocked, soils refertilized. The pioneer has perhaps more justification in this field than in that of coal and oil, but the capital cost of regrowing and restocking will ultimately be enormous. A conservation policy inaugurated even a generation ago would have done much to save the current supply, and reduce the future capital cost.

When the Pilgrims landed on Plymouth Rock there were some 800,000,000 acres of virgin forest land in the country. There remain today 138,000,000 acres. In addition there are 114,000,000 acres in second growth, saw timber size, 136,000,000 acres in second growth, cord-wood size, and 81,000,000 acres of original forest land on which nothing is growing. If there were no growth, our forests would be wiped out in about 30 years. And the annual growth does not help much. On the present stand it runs about 6,000,000,000 cubic feet a year—*less than one-fourth of the annual drain.* It is estimated that over 300,000,000 acres of the cut-over land is unsuitable for farming, and is not producing healthy second growth because of the reckless methods employed in the original exploitation. There are 81,000,000 acres—or about 10 percent of the original stand—devastated by soil erosion and fire on which nothing of value is growing or is likely to grow—an area equal to the combined forest lands of France, Germany, Belgium, Holland, Denmark, Switzerland, Spain and Portugal.

Lumbering methods have played into the hands of forest fires—magnificently. In the five years from 1916 to 1920, there were 160,000 reported fires which burned over 56,000,000 acres of land, destroying $86,000,000 worth of timber, while the damage to the nitrogenous humus of the soil was probably even greater.

The United States uses on the average 28 pounds of fertilizer per acre. Europe uses 200 pounds. This policy of starving the soil could be maintained so long as there were still new fields into which the pioneers might flow. Irrigation has stretched the margin somewhat. Edwin E. Slosson shows that we are still robbing the soil of a virgin continent, but that the process cannot go on much longer. Meanwhile the beehive coke ovens, as we have seen, release 700,000 tons of ammonium salts into the air each year—enough, in the opinion of Slosson, "to keep our land rich."

The effect of bird life on insect pests has long been known, but scientific application has too often been lacking. Grasshoppers, caterpillars, moths, beetles—the farmer's deadliest enemies—can be better held in check by birds than by any known human contrivance. A

flock of Franklin gulls will clear a large alfalfa field of grasshoppers in a day. Yet birds have been snared, shot and butchered in region after region.

The Secretary of Commerce in his annual report for 1924 comments upon pioneering methods in coastal fisheries. "The conservation of coastal fisheries is a matter of the utmost national importance. Many are threatened with extinction." The great runs of salmon on the Atlantic coast have long since disappeared as a food supply, and salmon on the Pacific were doomed until the Department of Commerce recently called a halt in their destruction. Sturgeon fisheries of the Great Lakes have declined 98 percent in forty years, and the sturgeon has almost disappeared from the Atlantic coast. Since 1835 the annual catch of shad in the Potomac has dropped from 22,000,000 to 600,000. In ten years the crab fisheries of the Chesapeake and Delaware Rivers have been cut in half. "Our lobster catch is less than one-third of what it was thirty years ago." We can take no quantitative toll of the waste in organic resources other than lumber, but these few references are perhaps enough to indicate the gravity of the loss.

In coal, oil, natural gas and lumber, we have already pointed out the values in raw materials which are lost through failure to extract by-products. These are by no means the only cases. Whenever material of any sort is burned or thrown away, with it goes a certain number of chemical elements—oxygen, nitrogen, carbon, sulphur—in various chemical combinations, which may or may not be valuable, but which are always suspect until the chemist has reviewed them. Even homely garbage has been found to reek with riches if capital enough can be put into its renovation. It does not pay, of course, to save all—perhaps most—discarded material. But it pays more now than it did a generation ago, and the process is accelerating. The Germans have brought it to a fine art. The invariable question to be answered is whether the salvage is worth the cost of conversion. The trouble is that while *no* must often be the individual manufacturer's answer because he cannot finance large scale renovation, the answer of the whole community is often *yes*.

We may recognize three sorts of waste in this field—the field, by the way, in which the whole modern philosophy of waste had its rise. There is loss due to failure to utilize by-products proper; there is loss due to failure to use a reasonably high percentage of the main product in fabrication; there is loss due to air pollution and stream pollution in the disposal of discarded material. Each is serious.

Beyond the by-product wastes in the power industries noted earlier, we may point out the following. According to Professor H. E. Van

Norman, president of the World's Dairy Congress, for every pound of butter that we eat, *three* pounds of milk solids are produced which are highly valuable as human food. The bulk of this three pounds —save for a little buttermilk, skim milk powder, and feed for hogs and chickens—is thrown away. In 1921, of 4.3 billion pounds of milk solids going into the manufacture of butter and cheese, only 2.1 billion pounds were used for human food, or for casein.

"Our 6,000,000 ton crop of sugar contains some 12,000 tons of nitrogen, 4,000 tons of phosphoric acid and 18,000 tons of potash—all excellent fertilizers, and all lost in refining, except where waste liquors are used in irrigating beet lands." On the whole, however, this "garbage pail" aspect of waste—despite its prominence in the public mind—is, in our eyes, a minor matter. Compared with such losses as spring from the military establishment, super-luxuries, unemployment, excess plant capacity, the retail store traffic, oil drilling, it is relatively speaking only a drop in the bucket.

More serious is stream and air pollution. Besides wasting materials, these practices put the public health in jeopardy. The Merrimac River from Manchester south is an open sewer, yet by nature one of the loveliest streams in New England. The pollution of the Ohio River by the tinplate industry is one of the worst examples in the country, and in the opinion of A. B. Jones, heating and ventilating engineer, it is all preventable.

The preceding figures and comments have all been drawn from recent surveys, many of them made in 1924. In this light it cannot be said that the Conservation movement, for all its brave promise, has much to show in net accomplishment for the generation since its birth. By and large, the pioneer and his methods remain the masters of the nation's ever declining store of natural resources.

56. OIL: THE MENACED RESOURCE[1]

By Ralph Arnold

More than three years ago a committee of eminent geologists made calculations which indicated that at the present rate of consumption the oil reserves of the United States—amounting, it was believed, to about 9,150,000,000 barrels—will be used up within twenty years. Of course no informed person expects this to happen, for it is physically impossible to find and exhaust all the possible oil wells within a much longer period than two decades. An ap-

[1] Reprinted from the *New Republic*, April 8, 1925, by permission of the author and publisher.

proaching oil famine will be preceded by a long-continued rise in prices, by the increasing importation of oil from Mexico and other foreign fields, by the improvement of processes for extracting the oil from shales, and by the commercial production of fuel alcohol on a large scale. But we can either hasten or retard this process by the manner in which we use our oil reserves. At the present time the production, refining and marketing of petroleum and its products is carried on under conditions which are not only ruinous to a great number of those engaged in the industry and unnecessarily expensive to the final consumer, but are almost criminally wasteful of a natural resource which, once gone, can never be replaced.

The system under which petroleum is now obtained is perfectly in accord with the private property rights of every man who happens to own a square yard of land above an oil pool, but it disregards the public interest entirely. If you go to Huntington Beach or Signal Hill in California, Burkburnett in Texas, or any one of a dozen other important fields you will see oil derricks rising like a forest. This is because each owner, having a legal claim to as much oil as he can get up through a hole in his own ground, was obliged, in self-protection, to begin drilling as soon as one or more of his neighbors did. As a result there may be twenty-five or more wells where two or three would have been sufficient for the commercial and economical extraction of the oil. Oil wells cost about $5,000 to $100,000 or more. Every unnecessary well either results in loss to its owner, or is charged against the price which the final consumer must pay.

But this is not the only loss from this source. In nearly every important field in the United States the oil is being taken out too rapidly, with wastes at the well heads, in storage and in transit. How swiftly the exhaustion of pools takes place is shown by the fact that about half of the total oil product of the United States comes from wells less than a year old, and that 90 per cent comes from wells less than five years old. Annual production is kept up only by the continued development of new bonanza pools, such as those at Santa Fe Springs, Long Beach and Dominguez, California, and Tonkawa, Burbank, Powell and Smackover in fields further east.

The wasteful exploitation of wells is only one of a chain of evils. The abrupt fluctuations in supply caused by the ebb and flow of the bonanza output are reflected in market conditions, and these market conditions are aggravated by the policies of large refiners and distributors, who control the major portion of the output, and consequently are able to manipulate retail prices. These companies, with

the aid of their large storage facilities, can push prices up when they wish to sell and down when they wish to buy. The producers lose through this manipulation of the market, and the retail consumer, though he may enjoy low prices for a time, always sees the price level go a little higher after each great fluctuation. Ten-cent gasoline today is likely to mean thirty-cent gasoline tomorrow. In 1923 over-production of the California fields disrupted markets as far east as Pennsylvania, caused the shutting down of smaller wells not only in this country but in places as remote as the Dutch Indies, and led to an unnecessary and wasteful competition between oil and cheap coal. The sale of oil at an abnormally low price is contrary to the best principles of conservation, since it leads in this way to its use where coal should be employed instead. We have an inadequate supply of petroleum for the uses in which there is no substitute. To devote it to other purposes is drawing on a national capital which cannot be replaced.

The seriousness of this situation has been generally recognized. In his letter appointing the Federal Oil Conservation Board, on December 19, 1924, President Coolidge said:

> It is evident that the present method of capturing our oil deposits is wasteful to an alarming degree, in that it becomes impossible to conserve oil in the ground under our present leasing and royalty practices if a neighboring owner or lessee desires to gain possession of his deposits. . . . We are not today, however, facing an undersupply of oil. The production of our 300,000 wells is in excess of our immediate requirements. That overproduction in itself encourages cheapness, which in turn leads to wastefulness and disregard of essential values. Oil, of which our resources are limited, is largely taking the place of coal, the supply of which seems to be unlimited, but coal cannot take the place of oil in most of its higher uses, on land or sea or in the air.

The Conservation Board, which is composed of the Secretaries of the Navy, of War, of Commerce, and of the Interior, announces its purpose as the "elimination of waste" and invites "men who know the facts to come forward and suggest safe lines for remedial action."

Unfortunately suggestions which really go to the root of the existing evils have not met with approval from the large interests which, in a measure, profit from them. The great refiners and distributors occupy somewhat the same position with respect to the public on one hand and the producer on the other that the middleman does in agriculture. They stand to gain by the normal as well as the artificial fluctuations of price. Though they themselves own wells,

they are not primarily producers and their interests do not coincide with those of the producers. The remedy must come from the producers themselves, backed, whenever necessary, by the representatives of the public.

Mr. Henry L. Doherty, a distinguished authority in this field, is the author of a proposal for the common operation of pools on principles which may be compared with those adopted by the farmers' coöperative associations, and which also bear some resemblance to the system of water district organization in the arid lands of the West. He recommends that "no land be drilled for oil until opened up by a government permit"; that "all land within drainage distance of existing production shall be opened for drilling"; and that "permission to drill land not subject to drainage shall be granted only when an Oil Exploration District has been formed." Mr. Doherty believes that the federal government has the authority to impose these conditions in the interests of conservation as well as of the national defense. I am convinced that many oil producers will agree with him that this, or an even more drastic degree of regulation, will be necessary if the producers themselves do not act.

The alternative is voluntary coöperation. The simplest way to obtain unit operation of pools—that is, the only method of operation which will yield the best results from the pool as a whole—is for the owners to merge their interests, put down only as many wells as are necessary for efficient development, and divide the returns according to the value of their individual holdings. The same principle holds good for regional fields and for the nation.

National coöperation among oil producers can be obtained by following the traditional lines of representative government. Each oil field within a state should have its committee of producers. Each state should have a committee formed of representatives from the regional committees, assuming, of course, that there are two or more of these committees. Finally, there should be a national committee, or board, which should have supervision over the production and distribution of the national supply of petroleum and petroleum products. Representation should be based upon the value of the properties concerned. Thus, California with a production (in 1923) of 262,876,000 barrels, should have proportionately a large representation than Indiana, with a little more than a million.

The national petroleum committee, with full knowledge of the current facts of production and demand, would be able to prevent such economic crimes as the competition between California oil and eastern coal. It would be able to determine when a given field was overproducing and when it was underproducing. It would

be able intelligently to estimate needs in advance, and to make preparation to meet them. Within certain limits the best place to store oil is in the ground, taking it out as it is needed. A national producers' committee would make this policy practicable.

The first objection which suggests itself is that producers undertaking any such projects would soon find themselves under indictment for violation of the anti-trust laws. If this is the case the government should give the petroleum well owners the same exemptions that have already been granted farmers and organized labor. In each case an exception was made to the general rule on the ground that a public interest would be served. But there are few economic interests more important to the nation than those depending on oil. Oil is a necessity of farming, of transportation, of industry. It is as basic as steel.

But would an organization of producers, such as I have outlined, ensure that the public interest would be served? Would they not be tempted to put their own advantage first? These questions, I think, can be satisfactorily answered. In the first place the federal and state governments would be represented on the various committees or boards, both as public authorities and, in the case of the federal government, as an owner of extensive oil deposits. Counting the public lands, the naval reserves and the restricted Indian lands nearly one-seventh of the total oil production in the fiscal year 1923–1924 was from fields either owned or controlled by the national government.

In the second place the interests of the 15,000 or 16,000 oil producers are not in monopoly but in stabilization. The monopoly interest is that of the refiners and distributors, who gain by fluctuation, uncertainty and waste. At the worst this plan would be an improvement over present conditions, if only because it would promote more economical methods of getting and distributing oil. Monopoly flourishes only with secrecy and irresponsibility, neither one of which could exist under the coöperative system I have proposed.

I do not anticipate Utopian results. The problem is not to arrive at an absolutely perfect arrangement, but to deal with a crisis which is rapidly becoming acute. The peak of oil production in the United States has probably passed. If our needs increase, or even if they do not decrease, we shall have to draw more and more upon foreign supplies; and these, as the uses of petroleum in other countries develop, will be more and more difficult and expensive to obtain. Every drop of oil wasted is, therefore, a permanent diminution in our national wealth. It brings us nearer an oil famine, which might, as

Secretary Work said last January, "paralyze the industrial structure of the nation."

I suggest coöperation, under government auspices and supervision, because I think it more workable in the oil industry than arbitrary government control. Mr. Doherty has said that the value of all the petroleum taken from the ground does not equal the money spent in prospecting and well digging. An industry which can maintain its output only by constant explorations at the risk of ruinous losses cannot be regulated like a railway or a light and power system.

But if the producers will not coöperate, or are not permitted to do so, the government will sooner or later be compelled to intervene.

Beard, (4th Ed.), 414–429.

XV

THE STATES AND THE NATION

The "founding fathers" were little concerned with the niceties of political theory and compromised upon the problem of the relation of the states to the nation. It was an economic issue, slavery, which brought this problem before the country, and the question of states' rights held the center of the political stage from 1830 to the Civil War. The settlement of that conflict applied to slavery, but since then the question of states' rights has arisen time and again. In nearly every case the doctrine has been resurrected because of some social or economic problem. The power of the national government has been slowly but steadily increased by legislation, judicial interpretation, constitutional amendment, and the subsidy system. In most cases the Supreme Court has held to extensions of national power, and step by step the grants of power under the commerce clause and the tax provisions have been utilized to take power from the states. Two constitutional amendments of the twentieth century have extended the power of the national government: the Eighteenth Amendment, concerning Prohibition; and the Nineteenth Amendment, concerning Woman Suffrage. The proposed child labor amendment failed largely because the specter of states' rights was raised for the purpose of defeating it. For the time being the limitation of state power by constitutional amendment has become unpopular. The subsidy system, which has so many attractive features, has been extended, and the result is nearly as effective as constitutional amendments. The bait of financial help has been such that few states have had courage to resist, even though in some cases they could ill afford to accept. With each grant of money the national government has acquired control. This is true in the case of highways, education, and other subsidized activities.

The basis of states' rights is questionable. Are state boundaries significant? Two factors have contributed to their extinction and to their continuance. Economic similarities have unified the nation, and economic problems have prevented the extension of national power. The psychology of our time is a national psychology, but with the right sort of appeal it may be changed to a state psychology. The present limiting conditions are temporary, and step by step national power will increase at the expense of the states.

57. THE PLEA FOR STATES' RIGHTS[1]

By Curtis Nettels

Between 1870 and 1912 the Constitution of the United States escaped amendment. During the eight years 1912–20 it was amended four times. Each of these amendments brought a major change in our government. One allowed Congress to levy taxes on incomes. Another shifted from state legislature to electorate the duty of choosing United States senators. One conferred national citizenship upon women and one brought within the province of the federal power the duty of enforcing prohibition. Each has in greater or less degree resulted in aggrandizing the nation at the expense of the states. Together these amendments would probably terrify any father of the Constitution who might turn up to hear about them now. They reveal a tendency at work in the country for transforming our government from a federal union into a national state; perhaps not in form but certainly in reality.

Since 1920 this tendency has continued at work. There are now (1925) pending the Child Labor and the Equal Rights Amendments. For the present the tendency, although it has never, of course, been unopposed, has encountered more than the usual obstacles. Mr. Coolidge stood on a platform in which promises for reduced expenditures outweighed the promissory support given to the Child Labor Amendment. Newspapers otherwise as far apart as the *New York World* and the *Chicago Tribune* have spoken repeatedly against federal interference in private affairs. During the late campaign, the cry went out, seemingly from every hamlet, for lowering the taxes and for halting the trend towards centralization.

This opposition to the expanding power of the national government is perhaps the outstanding feature of political thought in the United States of 1924. If all important political theories are the outgrowth of actual conditions, what are the conditions that explain the current state of mind? First, the hostility of men of wealth to proposals for benefiting the farmer and railroad workers through federal action—action to be financed by taxes on large incomes. Hence arises a double-headed attitude among the very well-to-do—their insistence upon reduced taxes and their emphasis upon states' rights in order to prevent taxation of hitherto exempt state bonds. Second, the anti-prohibition sentiment, with its revival of the locality-

[1] Reprinted from the *New Republic*, January 14, 1925, by permission of the author and publisher.

self-rule-plan. And again, the propaganda of the child-employing manufacturers pointing out that the states may lose their heritage of self-government if they yield control over local factories to Congress. These are not the only forces working against the centralizers, but they are, perhaps, the main ones, the ones most effective at the present time.

What is the prospect for returning to the conditions which made the doctrine of states' rights a valuable one for its time? During the past forty years a national consciousness has been replacing the oldtime popular loyalty to the states. One cause of this change is the new mobility of life led by most Americans. So much moving about as is done in the American family does not enable people to form deep attachments to state governments, and causes them to feel that they are too temporarily settled to warrant their becoming acquainted with the intricacies of state politics. This is not a small matter when it is remembered how migratory is the laboring class in the United States, and how many people work for corporations which move them about from town to town as if they were players on a chess-board. The prospect for advancement to thousands of Americans means changing their place of residence; we have to choose between permanent homes and better positions. The latter at present have the stronger pull with most of us. The change in city housing that has come with the triumph of rented apartments over homes is a significant recognition of the accelerating mobility of American life.

Another effect of the economic changes is worth a moment's notice. A principal feature of the lives of most Americans is that their experience is no longer comformable to special local patterns, but instead to a national pattern. The people of the various states as a whole no longer have peculiar ways of doing things—peculiar customs and amusements. In occupation and profession the processes of production are so standardized that a workman from Georgia may go to Iowa and continue his labors without inconvenience. The food that people eat, the clothes they wear, the things they read, the entertainments to which they turn are no longer home-made, having a peculiar local flavor, and distinct from those in other localities or states. Now these things all come from great national plants, and life is lived in California as it is in New York. This appalling standardization of all the articles of consumption—physical, emotional and intellectual—is having a tremendous effect upon the consciousness of the American people. It is breaking down their provincialism, destroying their awareness of existence in separate communities, causing them to lose pride in their state attachments.

Why should a person be peculiarly proud of Illinois when people are living in the same way in Ohio, Indiana and Missouri? They eat the same kind of food, go to the same movies, read essentially the same papers, wear clothes of the same style, and what not. The consciousness that develops from this similarity of habits and conditions is not local; it is national. Only at the national boundaries does the manner of life change and only here can Americans see that they are different from their neighbors. Seemingly, it requires contrasts and peculiarities before a group of people will feel politically self-conscious. Before the days of rapid transit and large circulations, the state was the group which bound Americans together; now the nation is the unit, and states are tending to lose their former marks of distinction.

Even before the time of the economic revolution, forces were at work to make the United States over into a unified nation. A principal one of these forces has been the influence of states added to the Union since the early part of the nineteenth century. These states were carved out of the public domain; they started their careers as but infants in wealth and population; they drew their settlers from other parts of the United States, and in so doing attracted men who did not lose their attachment to the Union during the period when they were without affection for their newly-adopted state. These states have been younger than the nation; they have been weaker, they have lacked traditions, history, and self-consciousness; and in the absence of state legacies they made the glory of the nation their own. The nation has so far overshadowed the single state in the West that the power and importance of the latter, even to its own inhabitants, have always seemed small compared with those of the former.

Thus the economics and the psychology of our times threaten the vitality of popular loyalty to the states. The actual facts of the modern world are changing our attitude and our habits—are weaving the many state types and traits into a national pattern. Is this transformation likely to stop? Not unless we forget the secret of the locomotive, of the wireless, of the cinema, and of the printing-press. Not unless the progress of science is arrested and we go back to the habits of our grandfathers.

What then is the plea for states' rights really worth? Many concerns of life may best be regulated by community action—and the state provides a convenient grouping of the communities for general supervision. Education, sanitation, justice—these and many other things are primarily local in character. The schools and the law courts for instance are isolated, self-contained units. Each one of

them in a given locality may and indeed is very likely to have some relation with similar units elsewhere, but its very life is not dependent upon that relation. If the schools of New York were to close up for a year, the schools of Wisconsin would not be gravely affected. Since these detached institutions do not affect other like units in a vital way they do not call for a national plan of control.

But the economic threats of a community do not end at its borders; they are national in their extent. The dependence of localities upon the outside for markets and raw materials or food is a settled condition of modern America. This dependence arises from diverse locations, of natural resources and from a haphazard distribution of the motive power which is used for turning these resources into finished products.

Broadly speaking, there are these two kinds of human concerns—one self-sustaining within a given community; one dependent for its vitality on outside conditions and contracts. The former are simple in character, and may be supervised by local agencies; the latter are complex and may be best regulated by national machinery. The state supplies a convenient area for grouping the independent social units so as to procure the economy and interchange of ideas that come through proper coördination and central control.

But the state is not well fitted for regulating the economic concerns of its citizens. This being the case, no other reason exists why the states should be made the agents of economic control. They have so far declined in the popular affections and estimation that they are no longer the means by which the people can best express themselves politically. Their one-time vitality as governing units sprang from popular interest in their traditions and loyalty to their authority. As that loyalty and that interest have declined—to that extent has the reason for emphasizing their rights in opposition to the federal power been weakened. If we, as a people, are being moulded into a national type, and are losing those peculiarities that spring from life in detached localities, we will not be likely to express ourselves politically through instruments which cannot cope with our hardest and most vital problems and which do not hold the first place in our affections.

Assuming that this is true—then the question of political control of economic practices is whether the nation is to exercise the control or whether such regulation should be attempted at all. The national agencies, by reason of their extent and because of the nationalistic tinge to our political emotions, are the logical agencies for the work. The effort to prevent national regulation on the plea of states' rights is really an attempt to perpetuate laissez faire. The

decision lies, not between state regulation or national regulation, but between national control or no control. If laissez faire is the best policy, then well and good, but it should be adopted by the nation directly and openly, and not on the deceiving supposition that we can return to state control, and go back to the days before rapid transit and standardized production on national lines.

58. CENTRALIZATION VERSUS DECENTRALIZATION[1]

By S. Gale Lowrie

University of Cincinnati

Thirteen years ago, the American Political Science Association directed its attention to the changing relation between our national government and the states. One of the speakers discerned in the tendency toward aggrandizement of national power, manifestations of the principle that sovereignty, unprovided for in extant forms, seeks to embody itself in new forms. The signal incompetence of the states in dealing with economic questions, together with their mendicant attitude towards the national government, was seen as the cause of the transfer to national authority of control over currency supply, transportation rates and methods, and the seeming disposition to transfer control over all corporations.[2] Other speakers called attention to the great increase of national power under the commerce clause and under the Fourteenth Amendment of the Constitution; and one, in a most thoughtful paper, openly challenged the federal system as established in this country, asserting that it showed disadvantages of increasing magnitude in comparison with a unitary system, and was out of harmony with the general environment of modern industrialism.[3]

The few years which have passed since these views were expressed have witnessed a conspicuous change in our institutions, and in no respect has this been so marked as in the increased scope allotted to our national government. It matters not so much under what provisions of the Constitution these extensions have been made; the fact is that there has been a constant, and to the present time, an

[1] Reprinted from the *American Political Science Review,* August 1922, by permission of the editor.

[2] Henry Jones Ford, "The Influence of State Politics in Expanding Federal Power," in *Proceedings of the American Political Science Ass'n.,* V, p. 53.

[3] Stephen Leacock, "The Limitation of Federal Government" in *Proceedings of the American Political Science Ass'n.,* V, p. 37.

ever-increasing demand that the governmental relations to business and commerce be established on a country-wide scale. This, together with a growing demand for funds from the national treasury, has resulted in a more rapid change in the relation between the states and the central government than has occurred during any other period of our history save that which immediately followed the Civil War.

A catalogue listing only the major avenues through which this movement has progressed would note national expansion in railway control, in the establishment of a national system of highways, in education, in taxation, in banking and in prohibiting the manufacture and sale of liquors, not to mention the enormous extension of national authority and influence under the war powers of the central government. The growth of what might be termed the national police power is seen in acts controlling the hours of labor of children (since declared unconstitutional) and the use of white phosphorous in the manufacture of matches, the use of safety devices on the railroads and shipment of unwholesome articles of food. The issue now pending before the United States Supreme Court as to the power to fix intra-state rates, is perhaps not less important than any case which has arisen under the commerce clause since John Marshall's momentous decision in Gibbons vs. Ogden.[4]

The increase of national influence through subsidies, particularly in education, presents again an old question. The states themselves pointed the way in this field and showed how a decentralized system of administration might permit the central authority to dominate, by providing funds made available only by compliance with specified standards and conditions. While national encouragement of education was evidenced in the early provisions for the sale and settlement of government lands and the Morrill grants, the element of central control was lacking until the recent grants for vocational training and other educational purposes introduced a practice which seems but on the threshold of a very great enlargement, and marks a distinct break with those of the past.

That the necessities of modern warfare should demand a highly centralized administration of national scope was to be expected. The railroads and telegraph systems were taken over by the government because of the collapse of the existing system of management. The re-institution of private operation in many financial, industrial and commercial fields inevitably leaves a residue of government control which did not exist before.

The most startling increase in national power we have had since the adoption of the Constitution,—save only the power conferred

[4] 9 Wheaton, 1.

by the Fourteenth Amendment—comes through the Eighteenth Amendment, which permits the central government to undertake the difficult task of prohibition enforcement. This is probably the most severe test of the efficiency of national administration we have seen in times of peace. Somewhat outside of the field of regulation lie such measures as the currency reform and the banking acts, and the tax statutes, which strongly operate to place under national influence the industrial agencies of the country.

The strength of the movement to lodge greater power with the national government at the expense of the states, is further evidenced by the amendments to the Constitution which have taken place in the period we are considering. Our Constitution had been considered an example of the rigid type, so much so that many, observing the great difficulty of utilizing the amending method, and recalling that the original document with the changes almost immediately incorporated, had been altered only by the rather questionable procedure used in making the Civil War amendments, believed it almost unamendable. Yet, each of the four changes since 1908, except possibly the last, tends to weaken the relative position of the states in our governmental system, and the last two show clearly the disposition to incorporate important changes by national rather than state reform.

While this centralizing movement seems at full tide, it is pertinent to inquire how far it is likely to extend and whether, if we are but on the eve of a still greater demand for national laws and administration, it would not be the better plan frankly to analyze the need and seek by constitutional amendment to vest definite powers in the central government, rather than continue to employ the cumbersome method of interpreting the commerce clause, the power to levy war or other section to accomplish the same ends.

Governmental power should be as broad as the problems with which it must deal. This principle is applicable whether state action is needed to regulate industry, to apply checks on what might develop as abuses, or to facilitate the legitimate activities of its citizens. The territorial extent of industry is usually determined by the width of the area covered by competing agencies. Industrial concerns desiring the same markets are likely to form agreements and probably combinations, and employees' groups are usually established upon a basis equally broad. It is obviously not always practical to maintain governmental institutions over so extensive an area. Other factors need consideration, such as differences in nationality, habits and customs of the people. The division of power between the American states and our national government applied these principles

fairly well to conditions as they existed when the Constitution was drafted. The central government was given charge of foreign relations and such domestic matters as under contemporary conditions of commerce and industry needed uniform treatment: coining money, fixing standards of weights and measures, controlling naturalization, establishing post offices and roads, and maintaining the army and navy. While the scope retained by the states was still large, the governmental powers there reposed corresponded in most instances to the areas covered by the industrial activities of the time. As Professor Leacock says: "In the days of Alexander Hamilton this allotment of jurisdiction corresponded with the natural facts of economic life. Today it does not." [5]

The expansion of national power, as these areas have widened, although appearing very great when we compare the federal system of the fathers with that of our day, has been far too slow to relieve our industrial life of a heavy burden. As the points of contact between the government and business have increased in number, and as the territory covered by single industrial and commercial managements has spread over state after state, railway commissions, industrial commissions, public utility commissions, insurance, banking and health commissions, all with broad regulating powers, have sprung up and have applied rulings which have often disregarded the country-wide nature of the enterprises controlled. State laws and constitutions of varying natures, variously interpreted by different judicial tribunals, have added greatly to this complexity, while a state policy of taxation has almost invariably been designed to secure the most revenue without regard to the possible imposition of double burdens in connection with that of other states.

It is interesting to note that while we have observed with general complacency the enhancement of the responsibilities of the central government, there are very definite movements towards devolution in both France and Great Britain. The problem of liberty in France, says Professor Barthelemy, is the problem of decentralization, resuscitation of the communes and the strengthening of local life and patriotism,[6] while Sir Edward Grey said in the House of Commons, that England's choice lay between "devolution or destruction." [7] The difficulties attendant upon extensive centralization are easily observable in Great Britain, France and the United States. Professor Garner criticises the highly centralized French administrative system,

[5] Leacock, "The Limitation of Federal Government," in *Proceedings of the American Political Science Association*, V, p. 44.

[6] J. W. Garner, "Administrative Reform in France," in 13 *American Political Science Review*, p. 32, n.

[7] J. A. Murray Macdonald, 114 *Contemporary Review*, 134, 137.

declaring it "impossible for the ministers or the directors at Paris to give their personal attention to one-tenth of the mass of petty matters that come up from the communes for their action; it has, in consequence, come to pass that many matters of local concern are determined by chiefs of bureaus and clerks at Paris rather than by local authorities who are most interested and who are in a better position to determine them quickly, and perhaps more wisely." [8]

Mr. MacDonald observes with respect to Great Britain, that Parliament has long suffered from an all but intolerable congestion of work, and the attempt to relieve Parliament by allowing the executive to assume a larger share, has greatly increased the functions of the latter and curtailed the deliberative functions of Parliament. Consequently, "long before the war broke out, with no special emergency to justify it, hardly a week went by in which one or other of the great Departments of State did not issue edicts of its own, in the form of Orders in Council or Provisional Orders, which changed existing laws, and had all the force and effect of Acts of Parliament without any of the scrutiny and debate to which they ought to have been subjected in Parliament." [9]

A not dissimilar tendency is discerned in our own country by Mr. Hughes, who gives warning of the danger of increased bureaucracy as the legislature more and more escapes responsibility by delegating its powers. This becomes a convenient method of compromise and legislative evasion, and the exercise of power is virtually irresponsible. As new needs have grown up, new agencies have been created responsible only to an appointing power busy with other matters. In consequence we are ruled not by the Executive and Congress but by a host of department chiefs to whose personal desires the rights of American citizens are practically subject.[10]

That the machinery of national government has failed to cope adequately with the increased burden centralization has imposed upon it, probably most observers will agree. Whether the difficulty lies in the amount of new work, or in the unwieldy size of Congress and its lack of organization adequate to function with the executive departments, or in the failure to reorganize the departments and redistribute the work in accordance with modern necessities, is at least open to argument. The fact remains that we have been approaching a danger limit in our tendency to place heavier burdens on Congress and the national executive departments.

[8] Garner, *loc. cit.*, p. 19.

[9] *Loc. cit.*, p. 137.

[10] Charles E. Hughes, "Address before New York State Bar Ass'n.," January 17, 1919, in 53 *American Law Review*, 661, 670.

The changing relationship between our political units has not been confined to that existing between the national government and the states. Maladjustments have been too evident within the states. While in most instances the difficulties have been political rather than constitutional, nearly every commonwealth with a large urban community within its borders has met an increasing demand for municipal home rule. And although relinquishment of power has been reluctant, the cities have assumed in an ever increasing measure, authority which formerly rested with the states. It might seem, in consequence, that ground between the upper and nether millstones of the national government on the one side and the cities on the other, the states were fast losing their importance. This might be the case were it not for the fact that they too are gaining in power through the centralizing tendencies already noted, especially in the fields of administration. Their gain is chiefly at the expense of the non-urban political subdivisions. In education, public health, utility regulation, banking, insurance control and in the making and enforcement of industrial regulations, the state governments have been playing a rôle of ever-increasing importance, and have probably assumed far more power and responsibility than they have lost to the national government.

It has frequently been asserted that, had the states foreseen the growth of the powers of the national government under the Constitution, that document would never have been ratified. But if their vision of the true nature of the government they constituted was limited, so too was their power to foresee the necessities which have successively called for these extensions of power. It is quite evident that we shall see a continuance of the centralizing tendency to effect not only national but international regulation and encouragement of enterprises, the activities of which reach so extensive a field. Commerce and industry cannot be restricted by the boundaries of our states or even of our nation. So state control must yield to national control, and the latter in turn, in many instances, to international control. That we are on the eve of an extensive development of international labor regulations is indicated by the institution of the international labor office under the League of Nations, the culmination of years of effort, fostered by the International Association for Labor Legislation, to form an international labor code. So far as our country is concerned, international action further enhances the power of the national government at the expense of the states.

But that the states will cease to form important units in our political system, one would scarcely predict. Events in Great Britain and

France indicate how easy it is to go too far in centralizing control of affairs essentially local. It is quite probable that changes in national administration will result in centering in local districts many matters now controlled in Washington, and in the process of devolution the states will play important roles. Insofar as the movement toward national control represents but a desire to shift to others the cost of governmental services, it is of doubtful value; but as a tendency to establish governmental action on a basis as broad as the field of the activity, there it seems in line with sound political principles.

59. THE AMERICAN SUBSIDY SYSTEM[1]

By Austin F. Macdonald

Federal subsidies to the states have increased from $6,000,000 in 1912 to $132,000,000 in 1926. Is it not time to examine the results of this phenomenal expenditure?

One of the most extraordinary political phenomena of the last decade has been the growth of a series of federal subsidies to the state governments. Not that there is anything unusual in the granting of land and money to the states for various purposes; such a policy is almost as old as the federal government. In 1802 Ohio received certain sections of land for the use of schools, and payment was early made to the states of a portion of the proceeds from the sale of public lands lying within their borders. But the development of the last ten years has been remarkable in part because of the vast increase in appropriations, and in part because of the extension of federal supervision and control over state activities.

In 1914 congressional appropriations for distribution to the states totaled slightly more than six million dollars; the amount appropriated for the fiscal year ending June 30, 1926, was in excess of one hundred and thirty-two millions. The following table shows the purposes for which subsidies were granted:

TOTAL SUBSIDIES TO THE STATES FOR THE FISCAL YEAR ENDING JUNE 30, 1926

Education:	
Support of agricultural colleges	$2,400,000
Support of experiment stations	1,440,000
Co-operative agricultural extension work	5,880,000

[1] Reprinted from the *National Municipal Review*, November, 1925, by permission of the editor.

TOTAL SUBSIDIES TO THE STATES FOR THE FISCAL YEAR ENDING JUNE 30, 1926

Education:	
Farmers' co-operative demonstrations	$1,000,000
Vocational education	7,167,000
Industrial rehabilitation	1,034,000
Total education	$18,921,000
Highways	$75,000,000
National Guard	31,466,486
Forest fire prevention	660,000
Distribution of forest planting stock	50,000
Maternity and infant hygiene	1,000,000
State fund under oil leasing act	[2] 5,034,178
State fund from sale of public lands	[2] 14,527
Grand total	$132,146,191

The above table does not tell the entire story, however. Many thousands of acres of the public domain will be transferred to the states during the fiscal year of 1926. Since the close of the World War millions of dollars' worth of surplus war material has been delivered to the states for purposes of highway construction. Nearly every year the states receive in addition other grants of money which, because of their sporadic nature and the manner in which they are granted, cannot be estimated with any degree of accuracy. One hundred and thirty-two million dollars is therefore a conservative estimate of the amount annually placed by Congress at the disposal of the states.

SUBSIDY A MEANS OF FEDERAL CONTROL OVER THE STATES

For a small portion of this expenditure the federal government receives practically nothing in return. A few of the earlier acts making annual grants of money and land were passed at a time when the spirit of localism was still strong, and the measure of control given the federal government over these subsidies was small indeed. But for more than nine-tenths of the funds annually granted to the states Congress requires a definite accounting and a large measure of federal supervision and control.

An excellent example of the manner in which federal control over state affairs may be secured without violating the Constitution is found in the case of venereal disease legislation. To prevent the spread of these diseases the national government offered grants of

[2] 1924.

money annually to the states, under certain conditions. One of these conditions was that each state receiving the subsidy should enact legislation concerning the travel of venereally infected persons within its borders similar to the federal legislation already in force with regard to persons taking interstate journeys. The national government made itself the judge as to whether or not state laws did actually conform to its own regulations, and reserved the right to withhold future allotments if in its judgment they did not so conform.

In this manner the federal government was able practically to exercise control over intrastate commerce, a matter reserved to the states under the Constitution. Of course, the letter of that document was not violated. The states were not compelled to pass legislation satisfactory to the national authorities unless they wished to receive the federal subsidy. But the inducement proved sufficient to cause forty-six states to meet requirements, thus approaching unanimity.

Venereal disease control, essentially a war time measure, was abandoned by the federal government with the return of peace. But there are many other fields in which national uniformity and coherence are rising from the ruins of state diversity and chaos. In the last decade subject after subject formerly left entirely in the hands of the states has been brought under federal supervision by means of the subsidy system. The states have been induced to permit national inspection and regulation of their forests, their militia, their highways. Their need for constantly increasing revenues has forced the states to ask for federal financial assistance with growing frequency, and so they have been obliged to acquiesce in "informal amendments" to the Constitution, by means of which national standards are being established and national minimums enforced.

BEGINNING OF THE FEDERAL SUBSIDY SYSTEM

The present federal subsidy system had its inception in a bill introduced in the House of Representatives by Justin S. Morrill in 1857. This measure granted twenty thousand acres to each state for each senator and representative, the money from the sale of the land to be invested, and the interest used as a perpetual fund for "the endowment, support and maintenance of at least one college where the leading object" was to be, "without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts."

Despite the bitter opposition of the southern members of Congress, who feared any further extension of federal authority, the bill passed both houses; but it was vetoed by President Buchanan. Again introduced in 1861, it once more faced the virulent attacks of southern critics, and it did not become law until 1862, after the withdrawal from Congress of every member from the seceding states. In its final form the Morrill Act contained little to alarm the foes of administrative centralization. It made almost no provision for the exercise of federal supervision or control over the expenditure by the states of the funds derived from the federal subsidy. All that was required was that reports should be made annually of the progress of each college, the sales of land scrip, and the use made of the proceeds therefrom.

Congress did not fix a minimum price for which the lands might be sold, with the result that most of them were disposed of at ridiculously low figures. The competition of the unsold national lands tended to force the price of the college lands down to the government price of a dollar and a quarter an acre. Some of the states that had no national lands within their borders even sold the scrip given them in lieu of land for fifty or sixty cents an acre, Pennsylvania securing but fifty cents an acre for most of its scrip, and Ohio even less.

How far short these states fell of realizing the magnificent possibilities of their endowment is made clear by comparing their action with that of the State of New York, which assigned all its scrip to Ezra Cornell at sixty cents an acre, with the understanding that he should pay for the land as he sold it, and that all receipts above sixty cents an acre should become an endowment for a university. Mr. Cornell located the scrip in the white-pine district of Wisconsin, and eventually sold most of the land at an average price of six dollars and seventy-three cents an acre. This gave Cornell University an endowment in excess of five and one-half million dollars.

AGRICULTURAL EXPERIMENT STATION SUBSIDY

The next subsidy law passed by Congress was the Hatch Act of 1887, which made an appropriation of $15,000 to each state and territory for the establishment and maintenance of an experiment station in connection with each of the agricultural colleges established under the Morrill Act of 1862. This statute made no real advance over the first Morrill Act in the matter of federal control. The only section providing for co-operative relations between the general government and the stations declared that "in order to secure, as far

as practicable, uniformity of methods and results in the work of said stations, it shall be the duty of the United States Commissioner of Agriculture to furnish forms, as far as practicable, for the tabulation of results of investigation or experiment; to indicate from time to time such lines of inquiry as to him shall seem most important, and, in general, to furnish such advice and assistance as will best promote the purpose of this act." No means was provided for compelling the stations to accept and profit by this advice and assistance. There was practically no supervision over state expenditures.

SUBSIDY FOR FORESTRY PURPOSES

But in 1911 a long step forward was taken with the passage of the Weeks Act, which made an appropriation of $200,000 "to enable the Secretary of Agriculture to co-operate with any state or group of states, when requested to do so, in protection from fire of the forested watersheds of navigable streams." The Secretary of Agriculture was given wide discretionary powers, only three limitations being placed upon the use of federal funds. One was that they should be devoted entirely to the protection of private or state forest lands situated upon the watersheds of navigable rivers; another was that they should not be allotted to any state unless it had itself provided for a system of forest fire protection; and the third, that the federal expenditure in any state should not exceed in any fiscal year the state appropriation for the same purpose. Here in embryonic form we find for the first time the characteristic features of the American subsidy system—state autonomy combined with federal supervision, and state matching of federal funds. The outstanding weakness of the act of 1911 was that it limited federal co-operation to the forested watersheds of navigable streams. These areas are but one portion of the great wooded regions requiring protection from fire. In 1924 this defect was corrected by the passage of the Clarke-McNary Law, which extended federal aid to all the timbered and cut-over lands of the forest areas of the United States. A small annual appropriation was also made to enable the federal government to co-operate with the states in the reforestation of denuded lands.

THE SMITH-LEVER ACT

Highly significant in the development of federal aid was the passage in 1914 of the Smith-Lever Act, providing for co-operative agricultural extension work between the United States Department

of Agriculture and the land grant colleges in the several states, to "consist of the giving of instruction and practical demonstrations in agriculture and home economics to persons not attending or resident in said college in the several communities, and imparting to such persons information on said subjects through field demonstrations, publications, and otherwise."

This statute contained two highly significant provisions. One was the basis of apportionment of the federal subsidy. Most of the earlier laws had allotted an equal amount to every state, regardless of its needs. The new act, after granting ten thousand dollars to each state, provided that the remainder should be distributed in the proportion which the rural population of each state bore to the rural population of all the states, as determined by the last preceding federal census. This more rational method of apportionment has done much to insure the popularity of the subsidy system. If millions of dollars are to be distributed annually to the states from the federal treasury, great commonwealths like New York and Ohio cannot be expected to agree to an arrangement that will give them no more than states such as Rhode Island and Delaware. The proportionately greater needs of the larger states must be recognized. On the other hand, the ten thousand dollar subsidy to each state, regardless of its population or size, makes certain that no commonwealth will lack adequate funds to carry out a profitable program of agricultural extension work.

The other significant section of the act stipulated that "no payment out of the additional appropriations herein provided shall be made in any year to any state unless an equal sum has been appropriated for that year by the legislature of such state, . . . for the maintenance of the co-operative agricultural extension work provided for in this act." This plan of requiring the states to "match the federal dollar" has been incorporated in all subsequent legislation granting federal aid, and has proved of great value. Not only has it stimulated local initiative and created a feeling of local responsibility, but it has vastly increased the funds available for co-operation between the federal government and the states. . . .

FEDERAL AID TO HIGHWAYS

In 1916 the construction of highways was brought under the federal subsidy system. The statute passed in that year provided in sweeping terms for federal supervision and control of the public roads of the United States. It made large appropriations, to be expended by the Secretary of Agriculture, in co-operation with the

highway departments of the several states, in the construction of rural post roads. Reconstruction and improvements of the highways, including the erection of necessary bridges and culverts, were to be a part of the work done by the federal government; but maintenance, including the making of needed repairs and the preservation of reasonably smooth surfaces, was made an obligation which the states must fulfill in order to receive federal allotments. The statute provided that "if at any time the Secretary of Agriculture shall find that any road in any state constructed under the provisions of this act is not being properly maintained he shall give notice of such fact to the highway department of such state and if within four months from the receipt of said notice said road has not been put in a proper condition of maintenance then the Secretary of Agriculture shall thereafter refuse to approve any project for road construction in said state . . . whose duty it is to maintain said road, until it has been put in a condition of proper maintenance." This clause put into the hands of the federal government a most effective weapon for enforcing federal maintenance requirements. . . .

APPROPRIATIONS FOR THE MILITIA OR NATIONAL GUARD

Enough has been said to make clear the manner in which the federal government enforces its requirements, and the other subsidies may therefore be treated in considerably less detail. As early as 1808 Congress began to make appropriations for arming and equipping the militia of the states, but it did not attempt to enforce national standards of any sort until 1886, when it attached to the appropriation for that year the proviso that "no state shall be entitled to the benefits of the appropriation apportioned to it unless the number of its regularly enlisted, organized and uniformed active militia shall be at least one hundred men for each senator and representative to which such state is entitled in the Congress of the United States." No administrative machinery was provided for enforcing this requirement, however, and the states were virtually free to obey or disregard it as they saw fit.

Acts passed in 1903 and 1908 extended congressional control and in 1916 the National Defense Act provided in sweeping terms for federal supervision and control of the militia. Several times amended, it has made possible the creation of a nationally organized body of state troops auxiliary to the regular army, and similarly equipped and disciplined. The word "militia" was dropped altogether, the term "National Guard" appearing in its place. The change in phraseology is significant. In its final form the statute

fixes the number of men ultimately to be enlisted at eight hundred for each senator and representative in Congress, and authorizes the President to prescribe the unit or units, as to the branch of service, to be maintained in each state. The qualifications for officers of the National Guard are enumerated in detail. They are to be drawn only from certain specified classes, and are to be examined as to their physical, moral and professional fitness by a board appointed by the Secretary of War.

Each company, troop, battery and detachment in the National Guard is required to assemble for drill and inspection at least forty-eight times annually, and to participate in encampments at least fifteen days, credit being given only for training of a prescribed character and duration participated in by a minimum number of officers and men. The period of original enlistment, after several changes, has finally been fixed at three years. Even the kinds of courtsmartial to be used in the National Guard are specified by the National Defense Act, which sets forth minutely their jurisdiction and powers.

MISCELLANEOUS SUBSIDIES

A number of other subjects, none of them placed within the scope of congressional action, either expressly or impliedly, by the Constitution, have been brought under federal supervision by means of the subsidy system. The most important of these are vocational education, the physical and economic rehabilitation of those injured in industry, and the promotion of the welfare and hygiene of maternity and infancy. Subsidies are also given for the eradication of the foot-and-mouth disease and for arresting the ravages of the pink boll-worm and other pests. In every case a large amount of federal control is required.

ARGUMENTS PRO AND CON

The rapid growth of the American subsidy system in the last decade has forced it upon the attention of men in public life, and has subjected it to the attacks of a host of critics. The objections raised are much the same as those advanced against any form of centralization. One group of opponents still advances the old arguments of the ante-bellum states' rights school. Subsidies, we are told, are leading to the development of a despotic central government which will absorb the powers of the states and menace the private liberties of their citizens. The federal government is pictured as a giant

octopus, reaching out with greedy arms to rob the people of their rights. The specter of an omnipotent and merciless bureaucracy is conjured up to affright the timid. The people are warned "to halt the destructive processes that are transferring all of the powers of local self-government to remote and irresponsible bureaus in Washington." The fallacy of this line of reasoning is obvious. Few people will accept a creed which implies that the state legislatures represent the people, while the national Congress does not; that the states are the jealous guardians of the civil liberties which a rapacious federal government is constantly striving to destroy.

Somewhat different, however, and much more difficult to refute, are the arguments of those who maintain that the rapid expansion of federal power will overburden the general government, and will inevitably lead to a breakdown of federal administration. They willingly admit that the work of government should be performed by that unit of government best fitted to perform it, and they acknowledge the superior efficiency of federal administration as compared with that of the states. But they add that this superiority is attributable to the smaller amount of work performed by the national government, and will speedily disappear when many of the duties now performed by the states are transferred to Washington. In this they may be correct. There may be a point beyond which federal administration will cease to function satisfactorily. But we have not yet reached that point. There can be no doubt that the supervision and control which the federal government has exercised over state activities during the last decade by means of its subsidy system has brought about distinctly higher standards in the state boards and departments affected.

A SUBSIDY ACT BEFORE THE SUPREME COURT

When federal grants had reached sufficient size to attract general attention, their constitutionality was questioned on the ground that they were an illegal attempt by Congress to legislate within the field of powers reserved exclusively to the states. In the spring of 1922 the Attorney General of Massachusetts gave an opinion that the Sheppard-Towner Act for the promotion of the welfare and hygiene of maternity and infancy was unconstitutional, and shortly afterward Massachusetts brought suit to prevent its enforcement. The Sheppard-Towner Act was well chosen for the test, because it dealt with matters clearly beyond the scope of direct action by Congress. Had some other law, such as the Federal Highway Act, been chosen, it might well have been replied that the Constitution itself vested in

Congress the power to establish post offices and post roads. But no such retort was possible in considering the care of maternity and infancy.

The opinion of the Supreme Court was delivered on June 4, 1923, in the joint cases of Mass. *v.* Mellon and Frothingham *v.* Mellon. The court dismissed the cases without considering the constitutional questions involved, on the ground that the mere question of congressional usurpation of state powers, when no personal or property rights were directly affected, was political rather than judicial in its nature, and therefore not subject to court action. The Supreme Court made several interesting statements, however, in the course of its decision, which, while in the nature of *obiter dicta,* yet make clear the attitude of the highest court of the land towards the subsidy system. "It is alleged," said the court, "that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the states. Nothing is added to the force or effect of this assertion by the further incidental allegations that the ulterior purpose of Congress thereby was to induce the states to yield a portion of their sovereign rights; and that the burden of the appropriation falls unequally upon the several states; and that there is imposed upon the states an illegal and unconstitutional option either to yield to the federal government a portion of their reserved rights or lose their share of the moneys appropriated. But what burden is imposed upon the states, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the states where they reside. Nor does the statute require the states to do or yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding." These words seem to remove all doubt as to the constitutionality of federal subsidies to the state governments.

EXPEDIENCY AND OTHER CONSIDERATIONS

The question of expediency remains, and will probably remain a subject of dispute as long as subsidies are granted. Whether good or bad, however, there can be no doubt that subsidies have proven extremely popular. The state legislatures have had to face a demand for a constantly higher standard of governmental service—for better schools, for better roads, for better protection. At the

same time they have been met with an equally insistent demand for no further increase in the burden of taxation. The problem of getting more money without raising tax rates has become acute. State legislatures have searched diligently for new sources of revenue, and one of the most prolific sources they have discovered has been the federal treasury. The general government has been willing to aid the states financially on its own terms, and the slight circumstance of accompanying federal supervision and control has not restrained the states from seeking federal grants. Nearly every state has accepted all or nearly all the subsidies proffered by the general government. Even Massachusetts, while protesting the constitutionality of the system before the Supreme Court of the United States, was receiving millions of dollars in the form of various subsidies.

The growth of federal grants since 1912 is as follows:

Year	Amount
1912	$ 6,060,483.60
1913	6,642,300.18
1914	6,205,679.21
1915	12,121,227.91
1916	9,625,568.79
1917	53,418,073.41
1918	48,068,415.73
1919	87,816,144.50
1920	122,230,144.51
1921	137,478,785.51
1922	180,463,450.03
1923	108,161,408.69
1924	126,268,056.30
1925	128,300,238.44
1926	132,146,191.55

The decrease since 1922 is the result of smaller appropriations for highway construction. Large sums are still spent on the work, however; and highway grants at present represent considerably more than fifty per cent of all subsidies. The National Guard and education are also important items, as will be seen by referring to the table at the beginning of this article showing the amounts of the several appropriations for the fiscal year ending June 30, 1926.

A word should be said in conclusion as to the necessity for a definite subsidy program. Grants are made by Congress without any coherent program before it. Some are made for objects of doubtful worth; nearly all are made without regard to the amount necessary to stimulate local authorities to the highest degree of

efficiency. Subsidies are granted for the most part on the basis of population; and population is at best a poor yardstick with which to measure local needs. The percentage of the total cost of performing each function of government which is borne by the nation as a whole varies from seventy per cent of the total expense of maintaining the National Guard to one and one-half per cent of all public expenditures for education. Some grants are made to the states unconditionally; others are made only in exchange for a large measure of federal supervision and control. If subsidies have become an established and essential part of American federal administration—and such seems to be the case—then Congress should determine without delay what principles are to guide the future distribution of federal funds to the states.

60. THE COLORADO RIVER COMPACT

The following is the text of the Colorado River Compact, signed at Santa Fe, N. M., Nov. 24, 1922:

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, having resolved to enter into a compact under the act of the Congress of the United States of America approved Aug. 19, 1921 (42 Statutes at large, page 171), and the acts of the Legislatures of the said States, have through their Governors appointed as their Commissioners: W. S. Norviel for the State of Arizona, W. F. McClure for the State of California, Delph E. Carpenter for the State of Colorado, J. G. Scrugham for the State of Nevada, Stephen B. Davis Jr. for the State of New Mexico, R. E. Caldwell for the State of Utah, Frank C. Emerson for the State of Wyoming, who, after negotiations participated in by Herbert Hoover, appointed by the President as the representative of the United States of America, have agreed upon the following articles:

Article 1—The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River system; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado River basin is divided into two basins, and an apportionment of the use of part of the water of the Colorado River system is made to each of them, with the provision that further equitable apportionments may be made. . . .

Article 6—Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River system not covered by the terms of this compact: (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

Article 7—Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

Article 8—Present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the lower basin, then claims of such rights, if any, by appropriators or users of water in the lower basin against appropriators or users of water in the upper basin shall attach to and be satisfied from water that may be stored not in conflict with Article 3.

All other rights to beneficial use of waters of the Colorado River system shall be satisfied solely from the water apportioned to that basin in which they are situated.

Article 9—Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

Article 10—This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

Article 11—This compact shall become binding and obligatory when it shall have been approved by the Legislature of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of

(Editor's note: The definition of terms in this compact Articles 2–5 are omitted.)

each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

In WITNESS WHEREOF, the Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, New Mexico, this twenty-fourth day of November, A. D. One Thousand Nine Hundred and Twenty-two.

W. S. Norviel,
W. F. McClure,
Delph E. Carpenter,
J. G. Scrugham,
Stephen B. Davis, Jr.
R. E. Caldwell,
Frank C. Emerson.

Approved:
Herbert Hoover.

Mathews, *American State Government,* pp. 1–27.
Kimball. *State and Municipal Government,* pp. 3–17.
Ogg and Ray, (2nd Ed.), pp. 138–156.
Dodd, *State Government,* pp. 24–53.

XVI

THE STATE CONSTITUTION

Every state of the Union has a written constitution which forms the legal basis of its government. The first state constitutions were drawn up during the American Revolution. Eleven of the original states adopted new constitutions, while Rhode Island and Connecticut made a few formal changes in their colonial charters, which were continued until 1818 and 1842, respectively. The Massachusetts constitution alone of this first group was adopted by popular referendum, the others having been made by legislatures or by revolutionary assemblies.

The general plan of these first constitutions provided for a bill of rights, separation of powers, and limitations of suffrage; but the process of amendment was omitted or not carefully defined. One aspect of the development of the state constitutions has been the increase in their length, until the distinction between constitutional principles and legislation has almost broken down. Distrust of legislatures and the increased social and economic problems of the state are responsible for this situation. A second feature of state constitutions is the elaborate description of the amending process. The legislatures have lost their complete power of amendment, and in all states except Delaware amendments proposed by the legislature must be approved by the voters.

The state legislatures have been limited in their amending power by the requirement of a three-fifths or two-thirds vote, by the demand for approval by two successive legislatures, by limitations of the number to be submitted in any one year, and by provisions against immediate re-submission. In thirteen states the voters may propose changes in the constitution through the initiative, and they also have the power of approval. In New Hampshire the constitutional convention is the only authorized method of proposing amendments, and in all other states, except Rhode Island, it is an alternative method, either expressed or implied. The calling of the convention, the size, the organization, the procedure, the popular vote required, vary from state to state. In general the convention is used for revision rather than for individual amendments.

The attitude toward state legislatures is indicated by the increased length of constitutions. As a result of this tendency the process of amendment will become easier. The line between fundamental law and statutory law grows hazy, and the methods of enactment may become more and more identical. A return to the original idea of a constitution would eliminate the necessity for such frequent changes.

61. PROCEDURE OF THE CONSTITUTIONAL CONVENTION[1]

Submission of convention's work: The procedure of the convention will vary somewhat in accordance with the number of changes to be made in the Constitution and with the method of submitting the convention's work to popular vote. The convention of 1869–70 (Illinois) submitted its work in the form of nine separate proposals, one proposal containing a revised constitution and the eight other proposals constituting the more seriously controverted problems acted upon by the convention.

The convention of 1869–70 set a wise precedent for the convention of 1920. There will be a number of issues before the convention of 1920 which are seriously controversial in character and upon which the people will wish an opportunity and should have an opportunity to express themselves separately. On the other hand, there are a number of non-controversial matters in the present Constitution which need to be changed, and to submit each of these matters as an independent proposition would be useless, and would place an unreasonable burden upon each voter. Such non-controversial matters might well be submitted as a unit in a revised constitution, if the convention sees fit to do this. Under this plan the voters would be able to pass as a unit upon non-controversial matters and to pass separately upon each matter of a controversial character or of distinct popular interest. It would be foolish to submit a series of separate propositions to the voters as to such matters as the amendment of prior laws by reference to their titles, the reading of bills three times in each house of the general assembly, etc.

The Ohio convention of 1912 submitted 42 separate constitutional changes to the people. The Massachusetts convention of 1917–19 submitted three questions to be voted upon at one election and nineteen questions to be voted upon at another election. With forty-two questions submitted, the plan of separate submission becomes too burdensome, but there should be no difficulty about submitting to the voters of Illinois each controversial question separately and the non-controversial matters as a single unit.

The long intervals which elapse between the meetings of constitutional conventions make it desirable that the convention should undertake a complete re-examination of the existing constitution in order to make changes either of addition or of omission which may have

[1] From *Illinois Constitutional Convention Bulletin,* No. 1, 1920. *The Procedure and Problems of the Constitutional Convention,* pp. 23–30.

become necessary since the framing of the present Constitution. However, such a complete re-examination can be had, and the work of the convention submitted without the undue multiplication of issues to be separately presented to the voters.

Length of conventions: The political situation in the year 1920 makes it desirable that the convention should complete its work and submit its proposals to the people as promptly as possible. A presidential year is not a good one in which to submit matters which should be deliberated upon carefully by the voters, even though the questions are to be submitted at a special election. It is desirable if possible that the convention's work be passed upon by the people before the excitement of the State primary and of the presidential campaign.

The convention of 1869–70 assembled on December 13, 1869, and adjourned on May 13, 1870, but took a recess from March 7 to April 12, 1870. In the convention of 1870 a great deal of time was wasted in the preliminary organization, primarily because of the discussion of the oath to be taken by the delegates. There seems to be no reason why the convention of 1920 should not be able to organize promptly and to complete its work within a period of four months.

Rules and committee organization: With a single specific object before it, a convention should adopt rules primarily for the purpose of accomplishing the following purposes: (1) to obtain full debate upon and deliberate consideration of each proposal of constitutional change; (2) to assure that every important proposal is disposed of only in accordance with the affirmative wishes of the convention; and (3) to have the work of revision or amendment carefully phrased for submission to the people, without an undue prolongation of the session of the convention.

In a convention, as in a legislative body, the organization of committees is the most essential problem. In the framing of a constitution it may be possible for a convention to conduct all of its work directly in convention, that is, acting as a body without going into committee of the whole or dividing the work among committees. But such a plan would be cumbersome and unsatisfactory, and has not been employed. In the use of committees conventions have employed three methods: (1) the transaction of business mainly in committee of the whole, with perhaps some smaller committees appointed to handle particular matters; (2) the appointment of one small committee with power to draft a proposed constitution and submit it for the consideration of the whole convention, either in committee of the whole or otherwise; (3) the appointment of a number of committees and the apportionment among them of the subjects to be covered by the constitution, such committees to report to the con-

vention, as such, or to the convention in committee of the whole.

The more usual practice has been for a convention to appoint a number of committees and to distribute among them the several parts of the constitution, to be considered and reported upon to the convention either in regular session or in committee of the whole. The number of committees appointed for such a purpose has varied considerably, running from four in one case to more than thirty in others.

The number of committees will, of course, vary with the work to be done by a convention, but if all parts of a constitution are to be examined with care there should be a separate committee for each important subject. Separate committees will also be necessary to deal with questions which are at the time of great popular interest, because an effort will naturally be made to have these subjects dealt with in the constitution. For example, should a convention be assembled in Illinois, it would be appropriate to have a separate committee upon the initiative and referendum. The New York convention of 1894 had thirty-one committees; the New York convention of 1915, thirty committees; the Virginia convention of 1901–02, sixteen committees; the Michigan convention of 1907–08, twenty-nine committees; the Ohio convention of 1912, twenty-five; the Massachusetts convention of 1917, twenty-four. The Illinois convention of 1869–70 had thirty-nine committees, a number much larger than was needed. Of these committees six made no report whatever to the convention, and because of the lack of care in planning the scope of committees, several committees were considering and reporting upon the same subjects. A much more satisfactory distribution of the work could have been made in the Illinois convention of 1869–70 had there been fewer committees; for example, there were separate committees on canals and canal lands, internal improvements, roads and internal navigation, which might well have been consolidated into one; and in several cases there were two separate committees to deal with closely related subjects, both of which were relatively unimportant from a constitutional standpoint. Upon the proper organization of committees and a proper distribution of work among them depends to a large extent the success of a convention.

The size of committees must, of course, vary. The number and size should be such that each member may have some committee service, but each member should not be burdened with service upon four committees, as in Illinois in 1869–70. Somewhat the same situation existed in the Ohio convention of 1912. The size of a committee must depend somewhat upon the function which it is to perform. For a convention there may be said to be three types of committees; (1) those on the formal business of the convention, such as com-

mittees on rules, printing, etc.; (2) those whose functions are largely technical, such as a committee on phraseology and style; (3) those whose function would be largely that of obtaining agreement upon broad questions of principle, such as might be to a large extent a committee dealing with the subject of municipal home rule. Of course, most committees will have duties of all three types, but some difference in size is justified. Committees of the first type should naturally be small; those of the second type may well be larger, but even for the third type committees of more than fifteen members are apt to work ineffectively. The average size of committees in the Ohio convention of 1912 was seventeen, and a number of committees had 20 or 21 members. Because of this the committee work was less effective than it might have been. There is a tendency to organize either a legislative body or a convention into too many committees and into committees each of which is too large for effective work. In the New York Convention of 1915 a large number of the committees had seventeen members each, and in the Massachusetts Convention of 1917 most of the committees were composed of fifteen members.

Committees are, of course, organs of the convention, appointed for the purpose of maturing matters for consideration by that body. A committee should, therefore, be subject at all times to control by a majority of the convention, and should have no power (by failing to report upon any matter) to prevent its consideration by the convention. Abuse of committee power is not apt to occur in a convention, but the rules should be so framed as to prevent the possibility of such abuse. In the New York Convention of 1894 there was the following rule: "Whenever a committee shall have acted adversely on any proposed amendment to the constitution such committee need not report such adverse determination, unless requested in writing by the member introducing such amendment so to do and it was determined (by the committee) in the affirmative." However, in this convention any matter might be recalled from a committee by the majority action of the convention; and a similar rule for recalling matters from a committee existed in the Michigan Convention of 1907–08, the New York Convention of 1915, and the Alabama Convention of 1901–02. In the Michigan Convention of 1907–08, there was a rule that "all standing committees before reporting adversely on any proposal shall notify the member presenting such proposal when and where he may meet such committee to explain the same."

In the Ohio Convention of 1912, there was a rule which read as follows: "Any time after two weeks from the time when the convention shall have committed any proposal to any committee, a report thereon in the meantime not having been made by said committee,

the author of such proposal may, when no other business is pending and in any order of business, demand that such proposals be reported back to the convention; and such demand when so made shall be deemed the action of the convention, and the proposal is at once before the convention subject to all rules of procedure as before. Provided, however, that this shall not apply to a member whose proposal has passed its second reading and has been referred (to the committee on arrangement and phraseology). The convention by a majority vote may demand the forthwith report of any proposal that has been committed to any committee."

In the Arizona Convention of 1910 committees were required to report upon each proposal referred to them within eight days after the day of reference, unless otherwise ordered by the convention. In Massachusetts in 1917 all proposals of amendment were required to be submitted to the convention by June 25, and all committees were required to file their reports upon such proposals of amendment by July 16. The New York convention of 1915 regarded it as sufficient to require that "the several committees shall consider and report without unnecessary delay upon the respective matters referred to them by the convention." The Arizona rule is unwise. Upon any important matter a number of proposals will be introduced and referred to a committee. The committee in framing a proposed constitutional provision upon the matter should consider all the proposals, and should report upon the matter as a unit. Any rule requiring a report upon each separate proposal within a limited time would greatly handicap the work of committees.

The form of committee proceedings and of committee reports ought to be left to the committees themselves. It has been urged in some conventions that committees should confine their reports to recommended clauses or articles without giving reasons for such recommendations. Where a recommendation relates to a change in existing constitutional provisions explanation is, however, usually desirable and should be given. A committee report should in all cases indicate what changes in an existing constitutional provision are being recommended.

Committees have ordinarily been appointed by the president of the convention, and this is the more satisfactory arrangement. As has been suggested, partisanship should be absent from the deliberations of a convention, but this, unfortunately, is not always the case, and where the person chosen as president is elected because of distinct partisanship the power of appointment is apt to be abused. In the New Mexico convention of 1910 the person chosen as president was a railroad attorney and apparently because of the fear that the

convention might be charged with being under the control of corporations the appointment of committees was vested in a committee chosen by the convention itself.

Introduction of proposals: The committees must do the detailed work of the convention and each committee should have before it as soon as possible all of the proposals relating to the subject which it is to consider. In order to accomplish this purpose conventions have often definitely agreed that after a certain date no proposals should be entertained unless presented by one of the standing committees. In the New York convention of 1915 (which met on April 6) no proposed constitutional amendment could be introduced after June 11, except on the report or recommendation of a standing or select committee. The Massachusetts convention of 1917 met on June 6, and proposals of amendments were required to be presented by the close of the day of June 25. In the Ohio convention of 1912 the rules made the introduction of proposals more difficult after the first two weeks of the session. Members will usually present their proposals as soon as possible, because early introduction may make a proposal more influential, but some rule is necessary in order that committees shall have all proposals before them in the early days of a convention.

Many convention rules have very properly prescribed the form in which proposals shall be introduced, requiring that all proposals be in writing, contain but one subject and have titles. In the Ohio convention of 1912 all proposals were required to be presented in duplicate.

Committee of the whole: With respect to the general conduct of a convention's work the committee of the whole has been found a convenient instrument. In the Alabama convention of 1901, where this committee was not employed, there was much wrangling over rules and points of order. In the Virginia convention of 1901–02 objection was made to the committee of the whole on the ground that its use would lead to repetition of debate upon each subject, an objection which finds support in the Kentucky convention of 1890–91, but this objection is more than counterbalanced by the simpler method of procedure in committee of the whole. A committee of the whole, completely unrestricted, is probably undesirable, but a simpler procedure may be had in committee of the whole, and the convention may at the same time adopt rules which place some limitation upon acting in committee of the whole. The rules of the Michigan convention of 1907–08 seem fairly satisfactory for this purpose. "The rules of the convention shall be observed in committee of the whole, so far as they are applicable, except that the vote of a majority of said committee shall govern its action; it cannot refer a matter to any other com-

mittee; it cannot adjourn; the previous question shall not be enforced; the yeas and nays shall not be called; a motion to indefinitely postpone shall not be in order; a member may speak more than once. A journal of the proceedings in the committee of the whole shall be kept as in convention." A similar rule existed in the Ohio convention of 1912. The important portion of this rule is that requiring that a journal be kept of proceedings in the committee of the whole. Stenographic reports should also be made of debates in committee of the whole, as well as of debates in the convention.

Limitation of debate: Most conventions have begun their work practically without limitation of debate, although the previous question has been permitted. In the Michigan convention of 1907–08 any member could move the previous question but must be seconded by ten members and it could be ordered by a majority of those present and voting. In the Ohio convention of 1912 a two-thirds vote was necessary to sustain the previous question. In the New York convention of 1894 several rules limited debate. The previous question could be carried by a majority vote, and the committee on rules could, when ordered by the convention, report a rule limiting debate upon a particular question.

Obstructive tactics seem to have been resorted to by the minority in the New York convention of 1894 and a rule was finally brought in and adopted denying the ayes and noes on formal and dilatory motions. The Michigan convention somewhat late in its session limited the length of speeches in committee of the whole, and the Illinois convention of 1869–70 found it necessary to adopt a similar limitation. In the South Carolina convention of 1895 the expedient was adopted late in the session of appointing a steering committee, to apportion the time and direct the work of the convention.

Convention debate should be free enough to allow adequate consideration of every proposal, but experience has shown that if a convention starts its deliberations without any limitations upon debate a large portion of the time is likely to be taken up with excessive debate upon the earlier questions presented, so that the later work of the convention must be unduly rushed. It is wise for a convention to impose a moderate limitation upon debate at the outset, and such a limitation should exist not only for the convention itself but also for action in committee of the whole.

In the Michigan convention of 1907–08 the first committee appointed was one on permanent organization and order of business. This committee was afterward made permanent. It reported the plan of committee organization and made other reports during the session of the convention. One of its recommendations, which was adopted,

provided for a weekly meeting of the chairmen of committees, to be presided over by the president of the convention, "at which meeting the chairmen of the several committees shall report progress and consider such other matters as may be of interest in advancing the work of the convention." Such a plan, if properly carried out, should do much to unify the work of a convention. In any organization of a convention there should be some central organization which will effectively direct the work and prevent loss of time. Much of the usual loss of time may be avoided by careful consideration in the first instance of the rules under which a convention is to proceed.

Editorial committee: A committee on phraseology and style is perhaps the most important single committee of a convention. Practically all conventions have had a committee of this type but the name of the committee has varied. In the Federal convention of 1787 there was a committee on style, and in the Illinois convention of 1869–70 there was a committee on revision and adjustment. A recess has often been taken by the convention so as to allow sufficient time for the work of this committee. In the greater number of conventions the committee on phraseology and style has been merely a proof-reading committee, and in some cases fear has been expressed lest this committee change the sense of proposals adopted by the convention. However, a committee is needed to do something more than the mere editorial work of removing inconsistencies in sense and language. The work of a convention is necessarily made up from reports of a number of committees and the proposals presented will naturally lack consistency in draftsmanship. The committee on phraseology and style should serve in large part as a central drafting organ to give unity to the work of a convention.

In the Michigan convention of 1907–08 effective use was made of a central drafting committee. Proposals introduced by members were read and referred to the appropriate committee; when reported by the committee they were taken up in committee of the whole, and when reported upon by the committee of the whole, were referred to a committee on arrangement and phraseology. The proposal when reported upon by this committee, was put upon its second reading and after second reading was voted upon. If adopted, it was again referred to the committee on arrangement and phraseology, which, after all proposed amendments had been considered, reported the complete revision as agreed upon, the convention taking a twelve-day recess in order to give time for this work. This revision was then considered by sections in the committee of the whole, was reported to the convention and was then put upon the third reading and voted upon by articles and as a whole. This procedure gave four different oppor-

tunities for the discussion and amendment of every proposal. But more important, it gave the committee on arrangement and phraseology great influence by allowing it an opportunity to revise the language of each proposal after it was agreed to in committee of the whole and before it was definitely adopted; proposals so revised came again to this committee to be consolidated into a complete constitution. As a result of this care the Michigan constitution of 1908 is the best drafted of recent state constitutions.

A somewhat similar use of its committee on phraseology and style was made by the Ohio convention of 1912. The consideration upon second reading was primarily upon the substance, and thereafter the proposal went to a committee on arrangement and phraseology and after the report of this committee it was presented for final action. The Ohio committee presented its reports in such a manner that each member of the convention had before him the original form of proposal adopted by the convention, the changes recommended by the committee, and the proposal as it would read if such recommendations were adopted.

In the Illinois convention of 1869–70 the committee on revision and adjustment was largely limited to detailed changes in language. The New York convention of 1915 and the Massachusetts convention of 1917–19 are of interest as presenting a fairly effective use of a similar committee. Of recent conventions those of Michigan (1907–08), Ohio (1912), and New York (1915), had the most satisfactory rules.

The rules of the New York convention of 1894 were based too much upon partisan considerations. The rules of the Massachusetts convention of 1917–19 are open to objection in that they allow absolute freedom of debate in committee of the whole, and tend to permit too great a degree of debate upon the measures first presented to the convention.

62. GENERAL OUTLINE OF STATE CONSTITUTIONAL DEVELOPMENTS SINCE 1776[1]

In this (Illinois) and other states there are two methods of constitutional change. One is through the assembling of a convention and the other is through the proposal of specific amendments. The proposal of specific amendments may be made in a number of states not only by the legislative bodies but also by initiative petition. New

[1] From *Illinois Constitutional Convention Bulletin*, No. 1, 1920. *The Procedure and Problems of the Constitutional Convention*, pp. 31–35.

Hampshire is the only state which does not provide for the proposal of amendments through legislative action. In New Hampshire the only method of constitutional change is that by a constitutional convention and in that state the question of holding a constitutional convention is submitted to the voters once each seven years.

With increasing detail in the state constitutions, the constitutional convention and the processes of specific constitutional amendment have become important legislative processes, not only for matters of fundamental importance but also for matters not properly fundamental in character. The increasing bulk of state constitutions and the consequent necessity for frequent alteration, have brought with them easier processes of constitutional change, and in a number of states at the present time the process of constitutional change is not more difficult than that of statutory change.

In this discussion an effort will be made to sum up first of all the general lines of state constitutional development in this country since 1776 and then to outline more in detail the specific changes which have taken place since 1900. The main lines of constitutional development from 1776 to the present time may be summed up under the following headings:

Development of the departments of government. In the first state constitutions the legislatures occupied a predominant position. The struggles of the colonial period between a popularly elected assembly on the one hand, and the governor (who controlled the council as an upper legislative body and the courts) on the other hand, naturally led the framers of new constitutions for independent states, to distrust the executive branch of the government and to concentrate almost complete powers in the hands of the legislative bodies. The first sixty years of constitutional development (1776–1836) were largely a period during which there was a readjustment of the equilibrium as among the three departments of government.

In most of the earlier state constitutions provision was made for the election of the governor by the legislature, and executive councils dominated by the legislatures further restricted the executive power in a number of the states. The governor possessed little power of appointment, for most important offices were filled by the legislature, and under the first state constitutions his control over legislation was slight.

But a distrust of the legislature soon arose, in part because of the large powers which it had, and in part because it exercised these powers unwisely. The New York constitution of 1777 made the governor a popularly elected officer, as did the Massachusetts constitution of 1780, and the New Hampshire constitution of 1784, and practi-

cally all state constitutions after this period adopted the policy of popular election, the Virginia constitution of 1830 being a notable exception to this statement. A lengthening term of office at the same time gave the governor greater opportunity to exercise his powers, as did also the discarding by most states of the cumbersome and ineffective executive council. With respect to the important executive offices of the state the power of the governor in most cases was not greatly increased but the power of the legislatures and their control over the executive was reduced by making such officers elective directly by the people—a movement whose influence may be traced by a comparison of the Michigan constitutions of 1835 and 1850. By the New York constitution of 1777 the executive appointing power was large but was confined largely to a council of appointment whose members were during much of the time out of harmony with the governor. This council of appointment disappeared in New York in 1821, and the governor's appointing power has gradually tended to increase throughout the United States—by virtue of the fact that the state governments have steadily become more complex and assumed new functions, thus increasing the number of appointive officers.

There has also been a steady increase in the governor's power over legislation. Of the earlier state constitutions, that of South Carolina (1776) vested an absolute veto in the president of the state, but this power was only once sought to be exercised and was withdrawn by the constitution of 1778. The New York constitution of 1777 provided a council of revision of which the governor was a member, which should have a suspensory veto, and a plan somewhat similar to that of New York existed in Illinois from 1818 to 1848. The Massachusetts constitution of 1780 was the first to give the governor acting alone a suspensory veto over legislation which might be overcome by action of an extraordinary majority (⅔) in the legislative houses. The New Hampshire constitution of 1784 was largely copied from that of Massachusetts, but the provisions for an executive veto of legislation was rejected by New Hampshire. The provision of the federal constitution of 1787 with respect to the presidential veto has been followed in principle by most of the subsequent state constitutions. Georgia (1789), New Hampshire (1792) and Kentucky (1792) followed the federal precedent by giving their governors a veto power. New York abolished its council of revision in 1821 and conferred this power upon its governor acting alone. As the states adopted new constitutions it became usual for the veto power to be conferred, and although several states have only recently conferred

upon their governors a negative over legislation, North Carolina today is the only state whose governor has no veto power.

The governor's veto power over legislative action has been so extended that in more than two-thirds of the states he now also has power to veto separate items in appropriation bills; the constitutions of Washington and South Carolina in addition confer upon the governor power to veto any section or sections of a bill presented to him, and to approve other portions of the bill so presented.

The executive department has thus in its organization and powers become stronger, and its gain in power has been largely at the expense of the legislature. Somewhat the same development has taken place with respect to the judicial department. In most of the first constitutions the judges were chosen by the legislative bodies, although in several states there was executive appointment, subject to confirmation by the executive council or upper branch of the legislature. The power of appointment was in most cases gradually taken from the legislature; this power in some states was at first conferred upon the governor, but the movement for popular election, which gained force from 1830 to 1850, has extended popular choice to judicial as well as executive officers. The legislative power of impeachment has continued in many states, and to it has been added in a number of cases an executive power of removal upon address by the legislative bodies.

But the most important power acquired by the judicial department in this country has been that of declaring invalid laws which in the opinion of the judges conflict with the constitution. The exercise of this power was not contemplated by the earlier state constitutions, but the courts which in our earlier state governments really occupied a subordinate position, were able to assume such power, largely because of the early developed distrust of the legislatures and of the feeling that some check upon legislative power was needed. The judicial power over legislation, once established, has steadily grown, in part by the assumption by the courts on their own motion of more extensive and detailed supervision over legislation, and in part also because the state constitutions have steadily added an increasing number of limitations upon legislative action, such limitations being subject to judicial enforcement, under the theory of judicial control as to the constitutionality of legislation.

Limitation upon legislative power. Reference has already been made to the fact that constitutional legislation has steadily increased in the states at the expense of ordinary legislation—that through revision or amendment much matter properly of a statutory character has been introduced into the state constitutions, thus limiting the

power of the regular legislative bodies. In addition legislative power is strictly limited by a series of specific prohibitions which have from time to time been introduced into the constitutions.

The first series of important limitations may be said to have resulted from the state internal improvement movement which gained force after 1830. The people of many states were carried away by a wild frenzy for internal improvements to be constructed at state expense, and plans often immature and impracticable were forced upon state legislatures; failure was almost sure to result. As a result of unwise plans adopted by the states during the period from 1830 to 1850 practically all of our constitutions now have strict limitations upon state indebtedness. "As the people had driven their representatives to enter upon internal improvements without caution, so when taxes began to press, they censured them without justice and disowned the policy."

The states having excluded themselves from the field of internal improvements, their place was taken by private corporations. These private corporations in their turn appealed for financial aid to the minor civil divisions of the state, upon whom no constitutional limitations had yet been placed, and which might aid railroads and other enterprises either under their general powers or under powers conferred for that purpose by the legislatures. The legislatures here again yielding to popular pressure permitted the civil divisions of their states to loan their credit heavily to projected railways and other similar enterprises. Here, too, unwise management brought financial disaster, and as a result constitutional limitations were adopted by which municipalities and other local divisions of the states are forbidden to loan their credit in aid of such enterprises or to incur indebtedness beyond certain fixed limits.

In a somewhat similar manner the early banking experiences of the states—and especially the abuses arising out of state participation in banking and out of legislative grant of bank charters—produced a series of constitutional limitations upon the passage of state banking laws. In the case just referred to the legislatures acted unwisely, but they acted under pressure of the people, and cannot be held entirely responsible for the abuses which resulted. The people insisted upon legislative policies which resulted in disaster and then after the injury had been done they imposed strict limitations upon their legislatures.

In many matters, limitations have been imposed upon legislatures as a result not so much of legislative incompetence or corruption as of actions resulting from popular pressure. But other classes of limitations have been the direct result of abuses for which the legislatures alone were primarily responsible—as with respect to favoritism in

granting charters to private companies, the passage of local and special legislation, etc. And on account of abuse of power by legislative bodies we now have a series of strict limitations upon local and special legislation and upon the methods of legislative action.

These limitations, which have been steadily growing in number, have decreased the power and influence of legislative bodies. And the popular distrust of legislatures, fostered in part by measures enforced by popular sentiment, and in part also by the incompetence of the legislatures themselves, has caused the adoption of constitutional provisions limiting the terms of legislative sessions, and providing that such sessions should be held biennially (and in Alabama quadrennially) rather than annually as under the earlier constitutions.

Popular share in legislation. During the past twenty years there has been a pronounced tendency to reduce legislative power still further through the introduction of the initiative and referendum.

The introduction of the initiative and referendum involves a greatly increased popular share in the legislation of the states, but this is only one step in a movement toward greater popular participation in government which has been going on since the establishment of independent states. The American Revolution was in its early stages a democratic movement, and in several states led to an extension of the suffrage and to the reduction of property qualifications for the holding of offices, but control of our first state governments was confined in great part to the propertied classes. The following steps may be pointed out as ones tending toward greater popular participation in government: (1) The extension of suffrage and abolition of property qualifications for voting—a movement which gained force after 1800 and which became triumphant during the first three decades of the nineteenth century, although Virginia held out until 1850. (2) The somewhat similar movement for the abolition of property qualifications for office, which covered the same period. (3) The movement which led to the selection of the more important state and local officers by popular vote, as a substitute for their appointment by the legislature or by the executive. This movement has been referred to above in connection with the choice of executive and judicial officers. This development took place in large part during the second quarter of the nineteenth century. (4) The movement for municipal home rule—for the framing of charters by cities or local divisions themselves—a movement which began in Missouri in 1875 and which has spread to a number of other states since that time. This movement involves a diminution of state legislative control over cities. (5) The movement for the popular recall of state and local officers. (6) Woman's suffrage.

63. THE CONSTITUTIONAL CONVENTION OF MASSACHUSETTS[1]

By Lawrence B. Evans

The constitutional convention of Massachusetts which assembled in the city of Boston, June 6, 1917, and finally terminated its labors at a short session of two days in August, 1919, is the fourth body of this kind which the Old Bay State has had. The first convention was held in 1779 and 1780 in Cambridge and Boston, and formulated the constitution of 1780. This instrument, to which sixty-six amendments have been added, is the oldest written constitution now in force anywhere in the world. The second convention was held in 1820, and submitted a series of resolutions part of which were adopted and part rejected by the people. A third convention met in 1853 all of whose proposals were rejected. After an interval of sixty-four years, a fourth convention was called, which met in 1917 and again in 1918 and yet again in 1919. It submitted to the people twenty-two amendments and a revised draft of the constitution, all of which were accepted.

The convention was composed of 320 delegates. Of these 16 were elected at large, 4 were elected by each congressional district, and the remaining 240 were elected from the districts created for the purpose of choosing members of the state house of representatives. They were elected without party designations, but before the election took place, the lines between the friends and the opponents of the initiative and referendum were rather sharply drawn, and this served practically all the purposes of party organization and designation. In fact, this question dominated the whole of the first session of the convention and overshadowed other questions which were probably of greater importance.

Three months before the convention assembled, the governor appointed a "Commission to compile Information and Data for the Use of the Constitutional Convention," to which were assigned offices in the state house, which were kept open throughout the first two sessions of the convention and where at least one member of the commission could always be found. In considering how it could be of most use to the convention, the commission reasoned that as the convention was made up of busy men who had neither the time nor in many cases the necessary training for undertaking extensive research, it

[1] Reprinted from the *American Political Science Review*, May, 1921, by permission of the editor.

would be most helpful to issue a series of bulletins, each dealing with a topic which was likely to come before the convention. To this end a circular letter was sent to all the men, about nine hundred in number, who had taken out nomination papers for election to the convention, asking them on what topics they would suggest that information be compiled. About one hundred different topics were mentioned, and on thirty-six of these, bulletins were prepared, of which an edition of five hundred copies was printed and a copy sent to each delegate as soon as issued. In order to achieve the largest usefulness, all of these bulletins should have been in the hands of the delegates before the convention assembled. The commission was appointed too late to make this possible, and the best that it could do was to see that each bulletin was ready before the subject with which it dealt was reported upon by a committee of the convention.

In preparing its bulletins the commission sought to give them three characteristics. They must be concise, else they would not be read; they must be authoritative, so that the delegates could accept their statements of fact as established and safely base conclusions upon them; they must be impartial and free from attempts at propaganda. When this series of bulletins began to appear, few of the delegates paid much attention to them, but this attitude gradually changed, and upon at least one occasion the convention postponed its debate upon a certain topic until it had received the commission's bulletin which was then nearing completion.

The commission not only compiled information for the convention, but it was made an integral part of the convention's machinery. Its members frequently appeared before committees, it assisted the delegates in the drafting of amendments, and its vice-chairman was made an officer of the convention and served throughout as technical adviser to committees. The most important function of this office was to assist the committee on form and phraseology in the final revision of proposed amendments before they were sent to the people.[2]

The convention was called to order by Governor McCall. This was peculiarly fitting, for he more than any other man is entitled to the credit for the enactment of the legislation which resulted in the holding of the convention. The delegates chose for their president Hon. John L. Bates, former governor of Massachusetts, and much of the success of the convention was due to his great ability as a presiding officer, to his fairness, and to the skill with which he helped the convention over many hard places.

The first session of the convention, which occupied the summer of

[2] The members of the commission were William B. Munro, chairman, Lawrence B. Evans, vice-chairman, and Roger Sherman Hoar.

1917, was dominated by the question which had been uppermost in the public mind since the holding of a convention was first proposed, namely, whether Massachusetts should adopt some form of initiative and referendum. A measure covering the subject was introduced and held the center of the stage throughout the session of 1917, but was put aside from time to time to permit the consideration of other questions which it was deemed necessary to submit to the people at the November election. Three such measures were agreed upon by the convention and adopted by the people in November, 1917. Each of the fourteen counties returned a majority in favor of each amendment. . . .

When these three amendments had been submitted to the people, the convention resumed its discussion of the initiative and referendum, and finally adopted a measure which provides for the initiation by the people of both constitutional amendments and of laws and also for a compulsory referendum on enactments of the legislature. The measure is too long for detailed description, but its distinguishing feature as compared with similar measures in other states may be said to be its exemptions. Neither the judiciary, nor judicial decisions, nor the anti-aid amendment, nor any of the great safeguards of liberty set forth in the bill of rights may be made the subject of an initiative petition. Having adopted this amendment by a vote of 163 to 125, and having provided that it should be submitted to the people at the state election of November, 1918, the convention adjourned until June, 1918.

When the convention reassembled, it should have felt stimulated by the endorsement implied in the overwhelming majorities by which the three amendments submitted had been ratified. The result however was otherwise. Although some of the questions discussed at the second session were not inferior in importance to those of the first session, it was noticeable that the interest of many of the delegates had materially flagged, and a considerable number paid little attention to the proceedings. Eighteen amendments were, however, approved by the convention, and at the election in November, 1918, they, as well as the amendment establishing the initiative and referendum—adopted too late for action in 1917—were ratified by the people. . . .

As already stated, the Massachusetts constitution of 1780 is the oldest written constitution now in force anywhere in the world. To keep it abreast with the needs of the state and with changing sentiment, sixty-six amendments have been adopted. As a result, it is often difficult to determine with precision what the requirements of the constitution are as to any given point. Hence, before adjourn-

ment on August 21, 1918, the convention provided for the appointment of a committee to prepare a revised draft of the constitution, striking out all obsolete matter, and inserting in the proper place each provision that was still in force. The chairman of the subcommittee which had active charge of this work was Hon. James M. Morton, retired justice of the supreme judicial court, whose wide experience and great learning and beneficent presence contributed so much to the work of the convention. Judge Morton prepared a revision (the Morton draft), the writer also prepared one (the Evans draft), and upon these two the committee formed a third draft, which was accepted by the convention at a short session in August, 1919, and was ratified by the people at the November election by a majority of more than 200,000. Unfortunately, in an effort to make sure that the revision had not altered the original sense of any provision of the constitution, some one obtained the insertion of the following ill considered section:

"Art. 156. Upon the ratification and adoption by the people of this rearrangement of the existing constitution and the amendments thereto, the constitution shall be deemed and taken to be so rearranged and shall appear in such rearranged form in all future publications thereof. Such rearrangement shall not be deemed or taken to change the meaning or effect of any part of the constitution or its amendments as theretofore existing or operative."

When the supreme judicial court was asked to determine whether the new draft was now the constitution of the state or whether the old instrument with its sixty-six amendments was still in force, the court held that the paragraph above quoted indicated that the new draft was not intended to supplant the old constitution, which therefore still remained the fundamental law. At the ensuing session of the legislature Senator Loring, who had been chairman of the committee on form and phraseology of the convention, endeavored to persuade that body to submit the new draft, with the obnoxious article omitted, as a constitutional amendment, but the motion was rejected almost unanimously.

In order to form a just estimate of the work of the constitutional convention it is necessary to look not only at the measures which it adopted but also at those which it refused to adopt. It is impossible of course to enumerate all the constitutional provisions which it might have submitted to the people for their approval. These cover the whole range of government. Neither would it be profitable to consider the proposals, several hundred in number, which were unfavorably reported by committees and were never considered by the convention. But of the proposals for amendment which were before the

convention and were extensively debated and finally rejected, three are of special importance, and as to these three, students of politics and government are practically unanimous in disagreeing with the judgment of the convention.

The first of these proposals authorized the legislature to classify property for purposes of taxation. The constitution of Massachusetts restricts the taxing power of the legislature, except as to taxes on incomes, to the levying of "proportional and reasonable" taxes. The supreme court has held repeatedly that the word "proportional" prevents the taxing of different kinds of property at different rates. All property must be taxed alike in proportion to its value. This rule may have been just and expedient in 1780, when the forms of property were less numerous and the economic organization of society less complex than at present, but it is contrary to the opinion which now prevails as to the proper basis of a sound system of taxation. Massachusetts particularly requires the elasticity which the levying of taxes by classes permits, for there is no part of the country where property has been accumulated in forms more easily evasive of the tax gatherer or where economic interests are more intricate. Yet the convention refused to alter the ancient rule. If the gossip of the corridors can be relied upon, certain real estate interests in Boston were chiefly responsible for the defeat of the amendment.

On the subject of social insurance the convention again failed to act in accordance with prevailing opinion. Whatever one may think of the merits of old age pensions, health insurance, accident insurance and other forms of social amelioration, particularly as applied to the needs of his own community, there is general agreement that every state legislature ought to be vested with the power to enact legislation of this kind. Whether the power ought to be exercised is another question. Several amendments were drafted for the committee on social welfare, all of which were reported to the convention. Among these the convention chose for discussion the most comprehensive one, one which authorized the legislature to enact practically any form of social insurance which met with its approval. As this proposal was supported by those members of the committee who were regarded as ultra conservative, an easy victory in the convention was predicted. But it was defeated, and strange to say, largely through the opposition of the labor delegates. It has been suggested that the amendment was unnecessary, inasmuch as the residuary power of the legislature is probably broad enough to cover legislation of this kind. This opinion is probably correct, but in the case of a matter of such extreme importance all doubt should be removed. Should Massa-

chusetts adopt a system of old age pensions, for instance, the constitutionality of the legislation would undoubtedly be disputed, and the matter would be judicially tested. It is unfair to the courts to place upon them the burden of deciding, on purely legal considerations, a question which the people ought to decide for themselves. Much of the criticism of the courts for decisions in cases involving the validity of social legislation would be avoided if the people would remove from their constitutions the ambiguities which make judicial action necessary.

The third amendment which the convention rejected, but which all students of government will agree should have been adopted, made definite provision for the calling of a constitutional convention. The constitution of 1780 provided that in 1795 the question should be submitted to the people as to whether a convention should be held. If they should decide in the negative, as they did, no further provision was made for resubmitting the question or for calling a convention in any other way. The convention of 1820 provided a method for amending the constitution through proposals initiated by the legislature, and it has been argued by some that the specific enumeration of this method excludes all others. A like situation exists in Rhode Island, and its supreme court has ruled in an advisory opinion that a constitutional convention cannot be held in that state. The supreme judicial court of Massachusetts has said, in an advisory opinion written by Chief Justice Shaw, the amendment on the initiative of the legislature is the only method of amendment authorized by the constitution of Massachusetts. Just what the court meant by this cryptic utterance is uncertain. If it meant that amendment through legislative action is the only method mentioned in the constitution, it stated an obvious fact. But if it meant that the mention of this method of amendment was sufficient in itself to remove from the residuary power of the legislature the authority to provide for a constitutional convention, many would dissent. Those who would apply in this situation the maxim *expressio unius exclusio alterius* fail to take into account the high nature of the residuary power of the legislature. It represents the whole political authority of the people. Subject only to the limitations of the federal and state constitutions, the power of the legislature embraces the whole range of political action. It is not to be presumed that it has been cut down unless the intention of the people is unmistakable. When the people of Massachusetts gave the legislature the power to initiate amendments, it did not take from it the power to adopt any other method of constitutional revision which it had previously had the power to adopt. Both reason and constitu-

tional practice in Massachusetts, clearly establish the power of the legislature to submit to the people the question of calling a convention. But the discussion of the subject establishes with equal clearness the wisdom of removing all doubt. Yet a resolution giving the legislature power to submit to a popular vote the question of calling a convention was rejected. The explanation is not clear. The resolution was acted upon late in the second session. The delegates were tired and it was difficult to attract their attention. The debate, particularly on the part of the opposition, was weak. The resolution was defeated perhaps as much by inertia as anything else, assisted by a feeling that the convention had already done enough.

Not the least interesting feature of the constitutional convention and its work is the action of the people upon the amendments submitted. At the election of 1917, three amendments were submitted, and the action of the people on them showed the popular referendum in its very best light. All of these amendments were adopted by substantial majorities. Furthermore each of them received a majority of votes in each county in the state, and in no instance was the number of blank ballots as large as the number of ballots in favor of the amendment. Still more impressive was the fact that the total vote for and against each of these amendments was about 85 per cent of the total vote cast for the various candidates for governor. . . .

There was one undesirable practice on the part of some of the delegates to the convention which should be mentioned in order that future conventions both in Massachusetts and elsewhere may prevent it. That is the abuse by delegates of the privilege of revising the stenographic report of the speeches which they addressed to the convention. When the question of printing the debates was under discussion in the convention, it was pointed out that these debates would not only have value in the future as discussions of the subjects with which they dealt, but also that they would throw light upon the meaning of doubtful clauses in the constitution, and hence would be consulted not only by students of public affairs but by legislators and by the courts. It is obvious however that the printed debates lose their value as guide to the meaning of the constitution if they are not a true record of what was said in the convention. We are all familiar with the scandalous length to which Congress has gone in granting leave to print and the privilege of extending remarks. It is believed that the constitutional convention never granted to any delegate formal leave to print, but the same result was attained through the privilege accorded to each delegate of revising the stenographer's report of his speech. In at least one instance, one of the most prominent

members of the convention revised his speech by substituting for it an entirely new one. The speech in the printed report was never delivered to the convention, and as the debates were not printed until after the adjournment of the convention, there was no opportunity for the delegates to detect this falsification of the record. Obviously such a speech is of no value as a guide to the meaning of the provision under discussion, for since it was never delivered, its assertions could not be corrected nor its arguments refuted.

The constitutional convention of Massachusetts furnishes strong evidence of the change which has come over the view taken by the people of the functions of government. Whether their conclusion be a wise one or not, it is unquestionably true that the people of our day have rejected Jefferson's maxim that that government is best which governs least. Public opinion requires that the field of governmental activity shall be enlarged, and that our political machinery, whose function a century ago seemed to be chiefly a protective and defensive one, shall now become the active agent for the conduct of enterprises which were formerly under private control. The wider the range of government becomes, the more necessary it is that its agents shall have large freedom of action. The carefully devised series of checks and balances to which John Adams paid eloquent tribute may easily result in deadlock. In accordance with the prevailing opinion of the time, most of the amendments submitted to the people of Massachusetts in 1917 and 1918 enlarged the sphere of the government and removed existing restrictions, while only a few of them imposed new restrictions. In this respect the convention of 1917–18 is in marked contrast with the earlier conventions in Massachusetts. The convention of 1820 submitted fourteen amendments to the people, only one of which involved any increase in the power of the legislature, while the convention of 1853 recommended no increase at all in the power of the legislature. Abuse of official authority is no longer the bugbear which it was to our grandfathers, or at any rate the people of our day are willing to incur the risk of such abuse in order to leave to their government freedom to act.

While the Massachusetts convention showed the prevailing opinion as to enlarging the sphere of government and removing restrictions on the action of governmental agents, it was essentially a conservative body. None of its recommendations was radical. It adopted the popular initiative and referendum, but surrounded it with many safeguards. It refused to make any substantial change in the judiciary. The substitution of biennial for annual elections was essentially a conservative measure. In fact, it may be said of all of the twenty-

two amendments which it submitted to the people that they made only such changes as are to be expected in any enlightened and progressive community which endeavors to adapt itself to the demands of new conditions and to keep in touch with the expanding range of men's thoughts.

Beard, (4th Ed.), pp. 451-502.
Mathews, pp. 29–49.
Kimball, *State and Municipal Government,* pp. 18–36.
Ogg and Ray, (2nd Ed.), pp. 606–623.
Dodd, *State Government,* pp. 93–128.

XVII

NEWER INSTITUTIONS OF DEMOCRACY

Popular control has an attraction to most voters which impels them to demand a greater share in government, without necessarily inducing them to utilize it when they get it. The belief in the competence of the average citizen to make decisions on candidates, as well as on economic and social questions, has promoted the development of democratic institutions. This movement is reflected in the long ballot, short terms of office, frequent elections, and, in the twentieth century, in the adoption of the direct primary, and of the initiative, referendum, and recall. These reforms were designed to correct abuses in the existing system, and in part their success has justified their existence.

Evaluation of these devices of direct democracy is a difficult task because they enable an electorate, when aroused, to rise in its might and force a recalcitrant legislature to recall a public official, or even to overthrow a state government. After the fury of the storm has passed, the voter calms down until his passions are again aroused. It requires public emotion to make them effective, and the complacency of the electorate and the zeal for private gain has limited their usefulness. An already overburdened voter cannot be helped by increasing his burden. The groups that were to be checked have found these newer institutions valuable for their own purposes, and have used them as often as did those who created them. The present tendency seems to be away from further direct control. Two systems come into conflict: representative government and direct democracy. One may fail to represent, the other may fail to "democ." Neither of the two horns of the dilemma is satisfactory by itself, for the voter wants both: one to be used when he is not concerned, the other to be retained as a check in case of necessity.

64. THE DIRECT PRIMARY IN WISCONSIN[1]

By Waldo Schumacher

. . . In conclusion, the following deductions may be drawn in regard to the candidates selected under the primary as contrasted with the convention system:

[1] From unpublished manuscript. Printed by permission of the author.

(1) The number of candidates has increased for the majority party, whereas in the minority party it has decreased. Inasmuch as the primary does not permit "the office to seek the man," an increasing number have started to seek the office. In the minority party, the possibilities of success being very remote even if nominated, fewer and fewer persons have dared to make the campaign which the primary involves.

(2) There was no drastic change in the nominees in the transition period between the convention and primary systems. The number of office holders who had been nominated by convention and who were renominated in the primary is not different from the totals of other years. In fact, a considerable number who had been nominated by convention secured renomination after renomination in the primary, showing that men who were deemed worthy of public confidence had been selected by the conventions.

(3) The ages of the officials elected under the primary differ considerably from the ages of those chosen during the convention period. An increasing number of young and old men are nominated and elected in the primary. There has been a decrease of almost a third in the 40–50 group and a proportionate increase of those under 35 and over 60.

(4) The number of renominations and reëlections is greater under the primary than under the convention system. It would seem from the experience of Wisconsin that the tenure of office has increased by about eight per cent.

The reasons for the lack of party responsibility may be summarized as follows:

(1) The members of minority parties, in lieu of contests in their own bailiwicks, vote in the primary of the Republican party. Though impossible to arrive at a positive and accurate conclusion, it seems that in about one-fifth of the nominations made in the majority party, there are enough members of other parties voting therein to swing the election one way or another.

(2) Plurality nominations are frequent in the majority party. It seems that one-fifth of all possible nominations and one-third of all contested nominations are made by a minority vote. In the instances where there are three or more candidates, four fifths of the nominations are made by a minority vote.

(3) Compromise is no longer possible in the making of the nominations and the drafting of the platform and, as a result, individual responsibility rather than party responsibility has resulted. Each candidate and each person elected to office does not necessarily feel obligated to consider the wishes of other officials and as a result he

may pursue his own course. This attitude is also reflected in the voter who no longer casts his vote for one or the other of the parties but rather for this or that individual.

(4) Independent candidacies, undertaken against the express decision of the voters in the primary, have become quite common since direct nominations are in vogue.

(5) The lack of agreement between governor and legislature and the absence of harmony within the latter body has at least been partially responsible for the increase of the legislative sessions, the number of bills introduced, and the number of laws which have been passed. There is a lack of party leadership in the legislature and the legislative caucus, where the attitude of the party on different questions is determined has been practically destroyed by the individualism and personal responsibility which the primary fosters.

(6) Finally, the detrimental effect of the primary upon the minority party is such that there is little chance that the persons who are nominated will be elected. It follows that the number of contested nominations in the Democratic party are very small. On the other hand, there are always contests in the Republican primary and those candidates strive to secure Democratic votes. The result is that the Democratic party as a functioning organization is practically dead. In the primary of 1922, it did not secure enough votes to entitle it to a place on the ballot under the regular party designation.

The experience of Wisconsin with the primary, as far as expenses are concerned, has certainly not been satisfactory. It has not borne out the contentions of those who claimed that it would place the poor man upon a par with his rich neighbor. On the other hand, it seems to have worked out in just the opposite way. It gives the advantage to the man who can most efficiently advertise himself before the public. He who can best sell himself secures the nomination. J. A. Aylward, twice Democratic candidate for Governor in Wisconsin, says that the use of money in the primaries is all powerful. "I think any man, I don't care who he is or what his record is, if he has got enough money, he can carry the state either on the Democratic side or the Republican side for a nomination for any office in the state." [2] The experience of other persons who have been candidates points in the same direction.

From these observations, it is obvious that nothing definite can be said in regard to the expenditures which are made by the different candidates or whether the cost was greater under the convention method than under the direct primary. Claims have been made that

[2] *Report* of Joint Committee of Senate and Assembly of New York (Albany, 1910) p. 111.

large sums were spent under the former method but these have never been substantiated. It has, however, been shown beyond the question of a doubt that large sums were spent in at least one primary campaign, and by taking the amount of political advertising in that campaign as an index, the conclusion can be drawn that larger sums are spent now than when the primary was instituted. The amount of political advertising is on the increase and, in addition, candidates resort more and more to the use of letters and circulars which are sent through the mails. This greatly adds to the expenditures which must be met. Billboards are also used more freely than ever before. All in all, there are strong indications that increasing sums are spent by the candidates and that these sums exceed the amounts which were expended during the convention days.

The pre-primary convention and the preparation of slates of candidates who are to make the run in the primary, give unlimited possibilities to the boss and to those who wish to impose certain candidates upon the electorate or to prevent others from becoming candidates. If such a convention is held, it is entirely extra-legal, since there is no method provided by law for the designation of men who should attend these conventions, nor for a just basis of representation among different parts of the state. It is responsible to no one, and as a result it may give to the unscrupulous person a big advantage which was not true in the regular party convention where the election of delegates, and the formation of the organization and procedure, were carried out in conformity to state law. The objections which had been urged against the convention before the days of the primary hold true with redoubled force against the pre-primary convention as it has been conducted in Wisconsin. This was seen in the last campaign where the slate of one faction was prepared, it has been claimed, not by a group of delegates representative of the voters of the state, but by a handful of politicians.[3]

The very fact that such pre-primary conventions are held shows that a real opinion is not expressed in the primary. In order to overcome this difficulty, a convention is necessary where it is possible for the delegates and leaders to get together, to discuss and take counsel with each other and to submit such action for confirmation in the primary election. This procedure is an attempt to secure the known advantages of the convention system over other methods of making nominations. Through it, the sponsors hope to effect compromises if necessary, to draft candidates who might be unwilling to become candidates in the primary if the field were divided, to

[3] *Milwaukee Sentinel* (Milwaukee), March 5, 1922.

make the "office seek the man," and to formulate a platform upon which the candidates make their appeal to the voters.

It is not to be gainsaid that such pre-primary conventions violate the spirit of the primary law. The convention, during the fight for the primary, was especially attacked by those favoring direct nominations and much was made of the abuses and defects of this system and the manner in which it had been perverted by the bosses to the detriment of the public. The evils of the convention system are doubly aggravated in the pre-primary convention since it is entirely extra-legal. The pre-primary convention is further a recognition of the fact, by the friends and opponents of the direct method of making nominations, that the expression of a real opinion is hardly to be hoped for through the agency of the direct primary.

There are thus a number of circumstances which would tend to reveal the fact that it is difficult, if not impossible, to express a real public opinion through the primary. The opinion is not public because of the small number of votes cast in proportion to the number who are eligible to vote and because of the large number of plurality nominations that are made. The law itself was adopted in 1904 by a minority of the people, less than half of those who voted for the candidates for governor indicating an opinion upon the proposition of the primary law. Neither is a real opinion possible regarding the candidates. Accident and caprice determine nominations, as is revealed by the large number of nominations made from among those whose names appeared first on the ballot. The second choice law further reveals the lack of opinion which prevailed among the voters as does also the difference in the totals cast for the candidates for the various offices on the same party ticket. Approximately one-sixth of the voters fail to vote for some candidate and the only explanation that can be made is that they have no opinion regarding the merits of the several office seekers. To remedy this defect, pre-primary conventions, very similar to the old convention system, but entirely extra-legal, are being held by both friends and foes of the primary law. Until a short ballot is adopted, it is probably impossible for a real public opinion to be expressed by means of the primary concerning the candidates to be nominated.

The primary, during the eighteen years that it has been in effect, has brought about certain remarkable changes. The provisions of the law have made it possible for outsiders to participate in the primary of another party. Those who so participated frequently held the balance of power in making the nominations. In addition, a plurality has been sufficient to nominate. This fact has given or-

ganized minorities greater opportunities to dictate nominations and minority candidates have been very common. Party responsibility has decreased and in its place has come individual responsibility. Each individual elected to office followed his own individual program. As a result, effective party leadership and unity of action were not generally found. The interest of the voters, formerly centered on one election, has decreased since the adoption of the primary and the corresponding increase of the duties of the electorate. It is difficult, if not impossible, for a real opinion to be expressed through the primary. Apparently, the expenses of securing a nomination have increased as compared with the convention method, and are as large or larger now than when the primary was first employed. Middle aged men were elected during the convention period. During the primary period, this middle aged group has decreased in numbers and younger and older men have been elected. The term of service of the men elected to office, on the other hand, has increased. It is possible that a number of the defects of the primary could be remedied by the adoption of a short ballot. Other undesirable features, such as the lack of possibility of compromise, would continue even if this reform were adopted.

65. THE DIRECT PRIMARY, WITH SPECIAL REFERENCE TO THE STATE OF MAINE[1]

By Orren Chalmer Hormell

The subject, how the direct primary has worked in Maine, may be logically presented under the following headings:

First. Has the primary given undue advantage to city candidates and deprived the country of its just representation in state and county offices?

Second. What has been the effect of the primary upon the number of candidates?

Third. Has it substituted plurality for majority in nominations?

Fourth. What effect has it had upon party organization and party harmony?

Fifth. What has been its effect upon the quality of officers chosen?

Sixth. Has the direct primary made it more expensive to run for office?

Seventh. Has the cost of the direct primary to the state and municipalities been excessive?

[1] Reprinted by permission of the author.

Eighth. What has been the effect of the direct primary upon popular interest in nominations?

FIRST. Has the Direct Primary Given an Undue Advantage to the City Candidate Over His Country Rival?

The *Portland Evening Express and Advertiser* maintains that it does. The "direct primary plan," it says, ". . . invariably gives the city candidate an advantage over the country candidate," since "a voter will almost certainly support a man from his own town." The same view is expressed by the *Bangor Daily Commercial.* Such a result was predicted on the floor of the senate when the bill was before the legislature. The statement that the city candidate has an undue advantage has been repeated so often and widely that it has been accepted almost as an axiom.

In order to discover the facts, the writer has made a study of the distribution of county officers and state senators between the cities and country towns in the counties having important urban centers for the six biennial periods since the adoption of the direct primary. The distribution for that period was then compared with a like distribution during the last six biennial periods under the convention system.

. . . Under the direct primary in comparison with a like period under the convention the city's share in the offices was reduced by twenty-two or 4.6 per cent., while the country's share was increased by the same amount. Five of the eight counties showed a loss for the cities and a gain for the country towns. A further analysis of the figures results in the interesting discovery that under the direct primary there has been a remarkable correlation of distribution of offices according to population as between city and country. The distribution of offices in every county except Kennebec has tended to approach more closely to the basis of the population distribution. On the basis of population distribution, the cities of the counties of Cumberland, Sagadahoc, and York, in the period prior to the direct primary, had been under-represented in the county offices, while the cities in the other five counties had been over-represented. A study of the figures shows how nearly the under-representation in the one group and the over-representation in the other have been wiped out. Bangor furnishes a striking illustration. Under the convention era, 1901–11, she held thirty-two to the country's twenty-eight county offices, while under the direct primary, 1913–23, she has held twenty-two to the country's thirty-eight.

It is interesting to note that in Kennebec county, which alone failed to follow the general tendency, the country towns rather than the city gained an "undue advantage" under the direct primary. A

fair explanation of the failure of Kennebec county under the direct primary to follow the general tendency to bring about a distribution of offices between city and country more nearly on the basis of population appears to be: First, That one of the large urban centers, Waterville, is a Democratic city in a Republican county; and, Second, That there appears to have been a movement in the Republican party of that county to win the party leadership away from the Augusta leaders, which movement may have tended to give smaller towns in the county a larger representation in the county offices.

The tendency under the direct primary for representation between city and country to approach the standard of the population distribution is further clearly indicated. During the last six biennial periods under the convention system, the representatives of cities won 14.3 less than their just proportion according to population, while under the direct primary they approached to within 3.2 of their just proportion on the basis of population. It is often contended that Greater Portland, including Westbrook and South Portland with Portland, has been securing more than her share of the state senators. Statistics show that Greater Portland with 70.7 per cent. of the population of the county held (1901–11) only 54.5 per cent. of the senatorial representation, while under the direct primary (1913–23) she has held 62.5 per cent. of the senatorial representation, which is 8.2 less than her population calls for. Is it fair to say in the face of such facts, that the cities have an undue advantage in securing senatorial representation, especially when it is recognized that on account of the constitutional limitation the cities are greatly under represented in the House? Portland has one representative in the House for each ten thousand people while many of the smaller towns have one for each three thousand.

It has been said that the distribution of offices is not a fair test, and that the real test comes when a candidate from the city runs in opposition to a candidate from the country. Applying that test to the Republican primary of 1922 in the eight counties chosen above, it appears that there were eighteen contests between country and city candidates; *twelve* were won by the country candidates and *only six* by the city candidates. . . .

SECOND. What Has Been the Effect of the Direct Primary Upon the Number of Candidates?

The answer to the question may be gained from an analysis of the following table:

TABLE IX

PRIMARY OF 1922
REPUBLICAN

Office	No.	Candidates	Unopposed	Majority	Plurality
U. S. Senator	1	3	0	1	0
Governor	1	3	0	1	0
State Auditor	1	3	0	0	1
Representative to Congress	4	4	4	4	0
County Offices	107	194	60	88	19
State Representatives	151	208	85	146	5
State Senator	31	48	4	27	4
Total	296	463	153	267	29
DEMOCRATIC					
U. S. Senator	1	1	1	1	0
Governor	1	1	1	1	0
State Auditor	1	1	1	1	0
Representative to Congress	4	4	4	4	0
County Offices	107	131	88	102	5
State Representatives	151	155	144	151	0
State Senators	31	33	27	31	0
Total	296	326	266	291	5
Total Republican and Democratic	592	789	423	558	34

It appears from the table that the average number of candidates for the Republican positions was about one and one-half, for the Democratic positions slightly more than one and one-tenth, while 71.1 per cent. of all the positions were filled by unopposed candidates.

Referring back it is seen that, in the three counties examined, three hundred and ninety-four candidates entered the primary contest for one hundred and eighty-eight county positions, which makes an average of slightly more than two candidates for each office. A comparison of the above results under the primary system with the number of candidates running under the convention system, based upon newspaper reports, shows that the change to the primary

has had little or no effect in Maine upon the number of candidates running for office.

THIRD. Has the Direct Primary Substituted Plurality for Majority Nomination?

One of the usual objections made against the direct primary is that it substitutes plurality for majority nomination. In theory that is undoubtedly a weakness. But how has it worked in practice? An analysis of the primary election return for 1922 shows that out of the five hundred and ninety-two positions filled by the two parties in the primaries, five hundred and fifty-eight were nominated by a majority vote, that is 94.3 per cent. received a majority of the votes cast. An examination of the nominations of ninety-six senators from Androscoggin, Cumberland and Penobscot counties since 1912 shows that ninety-four were nominated by a majority and only two by a plurality vote. An examination of the nominations of one hundred and eighty-eight county officers for the same counties over the same period shows one hundred and forty-nine nominated by a majority vote and thirty-nine by plurality vote. It seems fair to conclude, therefore, that the evils of plurality nominations have been experienced only to a slight degree under the primary.

FOURTH. What Has Been the Effect of the Direct Primary Upon Party Organization and Party Harmony?

The answer to the above is largely a matter of opinion. If political news in the daily press and the evidence given by the candidates themselves may be relied on, it is only rarely that bitter personalities among candidates in a primary have been indulged in. The candidate defeated in the primary almost invariably lends his hearty support in the election campaign to his successful opponent. In fact, a study of the newspapers reveals fewer political feuds in the party in recent years than appeared in the period from 1900 to 1912 when "ring" and "anti-ring" were often struggling to control the party nominating conventions.

The pre-primary state conventions provided for by the primary law aid in bringing the party leaders and delegates together for conference and discussion. There is a widespread feeling, however, that the lack of a county convention is a handicap to the party organization in the county. There is a widespread conviction also that some means of affording closer coöperation between the various party committees and organizations in the county would strengthen, there, party organization and harmony. The county committee bears the responsibility of conducting a vigorous campaign for the election of the party nominees. At times it is handicapped in so doing because there has been no getting together and coöperation in bringing

forward party candidates for the primaries. In some counties the county committee uses its "good offices" to make the adjustments for the primary necessary for party harmony in the campaign, while in other counties the committee hardly dares to take an open part in the primaries, since at times the cry that the committee is opposed to a given candidate strengthens his chances for the nomination. Probably the party committee, and the party voters, both, should share a part of the blame when such a feeling of distrust disturbs party harmony. It has been suggested that greater interest on the part of the mass of voters in the selection and work of the committee, and more publicity, and frankness on the part of the committee would tend to eliminate the distrust. With the distrust removed the party committee and chosen party leaders could then exercise the legitimate function of conferring with party members in all sections of the county, advising, and aiding to secure the adjustments necessary for party harmony.

On the other hand, it is sometimes contended that the elimination rather than the strengthening of parties in the nomination and election of county officers would be in the interest of better local government. The creation of a non-partisan county government in Maine, however, it seems to the writer, would necessitate, for its effective working, such changes in organization and tradition that it must remain for a long time to come purely an academic question.

FIFTH. What Has Been the Effect of the Primary Upon the Quality of Officers Chosen?

This again is a question upon which well informed opinion is much divided. The opponents of the system declare that the officers nominated under the direct primary are decidedly inferior in quality to those under the convention system. They fail, however, to mention names. The advocates of the primary system, on the other hand, ask if it is true that Curtis, Milliken, and Baxter have not been equal in courage, judgment, and administrative ability to governors of the convention era. Opinion is also divided with regard to the quality of the legislature under the primary system. It seems that there are fewer dominating leaders in the legislature than in former years. It is more difficult to secure the passage of measures through the legislature at the dictation of one man, or a few men. No one maintains that in recent years the legislature of Maine has been bossed or that it will obey orders. Persons interested in the passage of a measure can no longer "fix it up" with one or two men and know that its passage is assured. It must be admitted, moreover, that much social welfare legislation, such as limiting the hours of labor for women, workingmen's compensation, and public utility

regulations have been put on the statute books by the so-called inferior legislators. The efficient state budget system is also a product of the direct primary era.

A majority of the state representatives are nominated without opposition. For example, eighty-five of one hundred and fifty-one Republican candidates were thus nominated in 1922. These unopposed candidates are selected in the main by the same party committees and party influence that selected them under the convention system. When it comes to the selection of candidates for sixty-six contested positions the independent and unbossed candidate has a much better chance under the direct primary than under the convention system. A good illustration of the possibility, through the direct primary, of nominating an independent candidate in a contest with a leader of the organization is seen in the recent victory of Nelson over Viles in the second Maine Congressional District.

It is contended by some that the direct primary has closed the door to all but the "self-seekers," that no longer may the party call to its service, and the service of the public, men of exceptional talent and ability who will not campaign for the nomination; and that there is danger that the self-advertising demagogue will supplant the drafted statesman.

On the other hand, it is suggested that one would have to seek far into the annals of Maine politics under the convention system to find a public official who had not sought the place, and built his political fences in order to win the nomination; and, furthermore, that the quality of statesmanship and the spirit of public service among officials have not declined with the coming of the direct primary.

SIXTH. Has the Expense of Running for Office Been Increased by the Direct Primary?

Reliable statistics on the amount of money spent under either the direct primary or convention system in Maine are not available. The direct primary law limits the amount that may be expended by the candidate, and requires him to make a return to the secretary of state of the amount expended. Personal traveling expenses, postage and stationery, however, are exempted. The advantage to a candidate of meeting the voter personally in the primary campaign is obvious, and the wealthy candidate has an opportunity to spend a large amount for personal traveling expenses. It is doubtful, however, whether candidates for governor under the direct primary have spent any more for traveling over the state than was spent by Governors Burleigh and Fernald in their thorough-going canvass of the state under the convention system. A contest between factions for the

control of the state organization occasionally under the convention system led to the expenditure of large sums for securing pledged delegates. It is probably true that more money is spent by the average candidate and less by the party organization under the direct primary than under the convention system.

The added cost to the candidate under the direct primary has undoubtedly deterred, in a few instances, excellent men of limited means from announcing their candidacies for such positions as governor or United States senator. Whether the same lack of means would have prevented them from securing a majority of the pledged delegates in a delegate convention is a matter upon which opinions differ.

Seventh. Is the Cost of the Primary an Excessive Burden upon the State and Municipalities?

The cost of the primary, as provided by law, is divided between the state and the municipalities. The state pays for the printing and distributing of ballots, sample ballots, notices, and cards of instructions, while "the expense of calling and holding the primary elections, and the making and forwarding of the returns thereof (is) . . . paid for by the municipalities."

The cost to the state of holding primary elections for the six biennial periods since 1912 is shown in the following table:

1912	$13,353.94
1914	8,871.71
1916	10,517.51
1918	9,160.17
1920	12,421.81
1922	14,587.25
Total for the six biennial periods	$68,912.39
Average	$11,485.40
Average per capita	$ .015

The cost of the primary to the municipalities of the state cannot be stated accurately as it is combined in the financial reports of most cities with the cost of registration and election. The primary of June, 1922, however, cost the town of Brunswick $38.60, which is about one-half of a cent per capita, and probably a fair estimate of the cost to the average town. A comparison of the cost of registrations and elections in a primary year with the cost of the same services in a non-primary year in the larger cities shows that the primary has added not over one cent per capita to the total cost of nominations and elections in the city.

The cost of the primary to the state and municipalities each biennial

period of two to three cents per capita will be considered by no one as excessive. If the primary is worth having at all it is worth while spending that amount upon it. The problem of the primary, therefore, may well be considered on its merits alone and not on its financial aspect.

EIGHTH. What Effect Has the Direct Primary Had Upon Popular Interest in Nominations?

A compilation and analysis of the statistics filed in the office of the secretary of state shows that in the first Republican primary, in 1912, 50.7 per cent. of the vote polled at the election was cast at the primary. It increased to 60.5 per cent. in 1916, and to 73.3 per cent. in 1922. It fell to 41.9 per cent. in 1918 when Governor Milliken was nominated without opposition. The highest proportion of the Democratic vote was cast in 1914 when with a real contest for the nomination 42.2 per cent. of the September vote was cast at the June primaries, while the lowest was only 13.6 per cent. in the primary of 1922.

The analysis of the vote for county officers shows that rarely does the local contest alone bring out a big party vote. A primary in which there is no contest for the higher positions, that is, governor, U. S. senator and representative to Congress, as a rule, fails to arouse public interest. The experience with the direct primary in Maine, therefore, shows that the people will not generally become interested in nominating men for comparatively insignificant offices. The direct primary, it appears, functions less successfully in the selection of candidates for county positions than for state and federal positions if we may judge from the popular interest manifested.

The Present State of Public Opinion in Maine with Regard to the Direct Primary.

Since the close of the World War a movement for the repeal of the direct primary law has been growing in Maine. The chief causes underlying the movement seem to be: First, the conviction in the minds of many that the direct primary has not sufficiently produced the betterment in government promised by its proponents. Second, the reluctance on the part of many voters to go to the trouble of signing nomination papers and informing themselves regarding the qualifications of candidates to be voted on at the primaries. Third, the natural hostility toward the primary held by the old line politician who sees in the present state of public indifference and confusion an opportunity to restore the old convention system; and, furthermore, many of the amateur political workers, also trained under the con-

vention system, long for the return of the good fellowship, secret or mysterious conferences, and the trading and playing the political game enjoyed in the old time convention. Fourth, the reactionary swing of the political pendulum which tends to place under a ban of disapproval the progressive measures of the Rooseveltian era. Fifth, the conviction in the minds of a number of people that the principle of representative government is superior to the principle of direct democracy in party affairs; and that it is only by the conferring together of party representatives in a representative convention that the best candidates may be selected to run on the party ticket.

The opponents of the direct primary were successful in securing the adoption of planks in both the Republican and Democratic platforms in 1922 against the direct primary law. They are as follows:

Republican: "Whereas the Direct Primary Law was enacted by the people thinking it an improvement over our former system,

"And whereas it has been fairly tried and found unsatisfactory,

"Therefore we advocate the submission to the people of a proposition for its repeal."

Democratic: "We recommend the passage by the next legislature of a bill repealing the direct primary law and further recommend that this bill be submitted to popular vote in order that the people may express their views concerning the primary law in the light of their experience during the past eleven years."

Since the April conventions, however, the friends of the law have been making themselves heard, especially in the rural districts, and two of the leading organizations among the women of the state, the "League of Women Voters" and the "Maine Federation of Women's Clubs" have passed resolutions favoring the retention of the law.

Before considering proposed changes in the law, the opinions of leaders in the several states and the experience of other states with the direct primary should be presented.

66. PARTY AFFILIATION TESTS IN PRIMARY ELECTION LAWS[1]

By Miller McClintock

A comparison of party affiliation provisions of state laws effective in 1920 and those in force in 1908 points to two interesting con-

[1] Reprinted from the *American Political Science Review,* August, 1922, by permission of the editor.

clusions regarding the general trend of legislative attitude toward the primary election.

The figures of the accompanying table indicate that during that period, there was a growing desire for official definition and administration of the tests of an elector's eligibility to participate in party primary elections. During these twelve years, seven state legislatures deprived the political parties of the sole authority to designate who should, and who should not, participate in their nominating elections. As a result of this change, six of the states involved adopted an official definition of the test, while the seventh was content to share the authority with the political parties.

The favor in which the official test is held is shown by the fact that of the primary laws in force in 1920, thirty-one provide that the entire test shall be defined by the legislature. In six states the legislature prescribes part of the test and permits the party holding the primary to specify additional qualifications. In only seven states are the political parties given unrestricted jurisdiction.

Regulations for administering the tests likewise show evidence of a trend toward increased official control. During the period indicated the political parties of six states lost the power to require enrollment under party supervision as a prerequisite for participation in the primary election. Perhaps the most striking indication of the general trend is to be noted in the figures regarding registration. Between 1908 and 1920 fifteen additional states adopted some form of official registration.

A second conclusion which may be drawn from the comparison is that while the legislatures were assuming a greater share in defining and administering tests of party affiliation, they were at the same time more effectively protecting party organization. The comparison shows that on the whole the primary election is becoming more strictly a closed primary.

This conclusion is substantiated by the figures regarding registration, which show a material increase in the number of states requiring an official registration of party affiliation as a basis for participation in the party primary. As a result of this change, increased difficulties were placed in the way of the elector who wished to change his party affiliation. Under the official registration provisions in twenty-six states the political party is comparatively safe from invasion at the primary.

This same tendency toward greater protection to party integrity is shown, though somewhat less significantly, by the figures indicating changes in the types of tests required. The single test of present

affiliation, which offers a minimum of protection to the party organization lost four supporters, while the similarly unprotective test of future intention lost two. The relatively high protective test of past allegiance retained the same number of supporters. There was, however, a significant shift toward what may be called complex declarations, usually requiring a statement of affiliation upon two or more grounds, though occasionally permitting alternatives. Six states participated in the change to the complex declaration.

CHANGES IN PARTY AFFILIATION PROVISION OF STATE PRIMARY ELECTION LAWS

	1908 [2]	1920 [3]
I. Open Primary	4	3
II. Closed Primary		
A. Authority prescribing test		
1. The political party	14	7
2. The legislature	25	31
3. Party and legislature	5	6
B. The voter's declaration		
1. Past allegiance only	5	5
2. Present affiliation only	17	13
3. Future intention only	4	2
4. Past action and (or) present affiliation	1	6
5. Past action and (or) future intention	3	3
6. Present affiliation and (or) future intention	5	8
7. Past action and (or) present affiliation, and (or) future intention	4	2
C. Record of declaration		
1. Declaration at primary—no preserved record	15	12
2. Enrollment under party supervision	7	1
3. Official registration	11	26

In summary then, the comparison shows increase in the number of states officially defining and administering tests of party affiliation, and at the same time additional provisions for protection of party organization.

[2] Summary in Schaffner, *Primary Elections* (University of Wisconsin, 1908), and laws in effect.

[3] From a survey of primary election laws effective in 1920.

67. THE INITIATIVE AND REFERENDUM AND THE ELECTIONS OF 1922[1]

By Schuyler Wallace

The Noes have it again. As usual, a majority of the measures submitted to the people were voted down during 1922 to the tune of 100 to 66. Although the recommendations of state legislatures in regard to matters of constitutional concern were more often approved than were any other class of measures, even here the mortality approached fifty per cent.

Of the forty times that legislative action was questioned by referendum petitions, in thirty was the measure vetoed by popular action. On three quarters of the occasions that sufficient apprehension was aroused in any portion of the public to cause them to reach for the emergency brake, that brake was applied. Nevertheless, unless the output of our assemblies has diminished considerably since 1905—and such is not the case—the referendum must still be considered in the light of an emergency appliance. Thirty vetoes upon thirteen thousand measures warrant no other appellation. The referendum, 'tis true, is confined to twenty-two states, but, even so, the percentage must be exceedingly small.

Although forty-two measures were proposed by the initiative, only six passed. It is interesting to note that of these six, four were in California. Two established medical examining boards, osteopathic and chiropractic; one outlined the budget procedure and established a system of itemized revenues and expenditures; and the other favored state aid to veterans of the World War in the acquiring of farms and homes. The automobilists in Colorado were evidently disturbed over the condition of the roads, for the state voted a $6,000,000 bond issue upon popular initiative. In Washington the poll tax was abolished.

The following table sums up the situation.

Grand Total	174	Yes	66	No	100[2]
Constitutional Referendum	92		50		42
Initiative measure	42		6		28
Referendum	40		10		30

[1] Reprinted from the *National Municipal Review*, April, 1923, by permission of the editor.

[2] Figures on the educational reorganization of Arizona, the Oregon proposals, and the game law of Arizona are not available.

CHARACTER OF THE MEASURES

Of the one hundred and sixty-six measures from which returns have been secured, over one-half (86) dealt with matters which were distinctly political, *i. e.*, measures relating either to administrative organization or to reform in methods of popular control. One quarter (43) dealt with public finance, a matter which could with some justice be placed under the category political, but which because of its far-reaching social and industrial consequences has been singled out for separate consideration. Twenty-five of the measures dealt with social problems, and twelve with economic and industrial.

The political measures were principally of seven types, those containing suggestions as to administrative reorganization, those increasing local autonomy, those reapportioning representation, those dealing with terms of office, and those increasing the pay of government officials. Attempts were also made to improve election machinery. In several states there were proposals for constitutional conventions.

In general, proposals for radical reorganization were voted down. This was the case in both Arizona and Missouri. Patchwork reorganization was generally approved. Measures of this character ranged from the establishment of additional examining boards in California to increasing the power of port authorities in Louisiana and Michigan.

The trend of the times is still toward increased local autonomy and increased local power. This was evidenced not only in the Pennsylvania home rule amendment, but in the defeat of all attempts to increase legislative power over localities. The fate of the suggestion in South Dakota that the legislature be allowed to change county lines without reference to the inhabitants thereof was typical.

Another characteristic of the period is economy, clearly indicated in the defeat of all attempts to increase the pay of public officials, and the attempts were numerous.

Wherever the matter was submitted to vote, as it was in Nebraska and Washington, assaults upon the direct primary were repelled. In fact, all attempts to infringe upon the principle of direct government either by raising the number of signatures required for initiative, as in California and South Dakota, or in the application of a literacy test, as in Washington, were voted down. In three states, Colorado, Illinois, and Virginia, the proposition of calling a constitutional convention was voted down.

FINANCE MEASURES

Finance measures fall into four general categories: taxation, bond issues, tax limits, and debt limits. Practically all measures of tax reform were defeated, whether they were measures of classification as in California and Utah, or of income as in Colorado and Michigan, or the single tax as in California and Oregon. The poll tax was repealed in Washington, but this is about the only straw of hope the ballots hold out, and this, in the opinion of some, was offset by the passage in Alabama and California of special tax exemptions for service men.

Bonds were issued last year for three purposes, road building, internal improvements, and soldiers' bonuses. Measures in favor of the latter were passed in California, Iowa and Montana. A further proposal was defeated in California, and in Oklahoma the major bonus proposal went down to defeat. In Alabama, Colorado, and New Jersey, bonds were issued for road building purposes. In Arizona an initiative proposal of this character was voted down. In Alabama $10,000,000 were voted for internal improvements, but the $500,000,000 proposal in California was more than the voters could stomach.

Both tax limitation and debt limitation measures fared ill at the election. The Ohio tax proposal failed, although one in Alabama carried. Efforts to increase the debt limits of Arizona, Utah and Wisconsin accomplished nothing.

SOCIAL QUESTIONS

Of the twenty-five attempts to solve social problems, large numbers dealt with matters of education. These ranged in character from proposals to reorganize country school systems to an attempt to change the location of the University of Colorado. Most of the suggestions were not accepted. Perhaps the most interesting was the compulsory education bill of Oregon. All children of school age, with certain exceptions, were compelled to go to the *public* schools of the state. Despite the opposition of Lutherans, Seventh Day Adventists, Roman Catholics, independents and private school interests, the measure passed.

Three states had referenda upon prohibition. There was, also, an expression of public opinion in Illinois. In the three states that voted upon concrete measures, prohibition won the day. Two out of the three states voted dry and in the total vote of the three states,

the drys led by more than 100,000. If the figures for Illinois, where the Anti-Saloon League leaders advised the drys to refrain from voting and so prevented a real test of strength,—if the figures of Illinois are added, the lead falls to the wets.

The anti-vivisection forces were overwhelmingly defeated as were also the proponents of motion-picture censorship. In fact, most of the proposed social reforms were disapproved.

With the exception of two propositions recommended by the legislatures of Minnesota and Nebraska respectively all propositions in regard to industrial matters, whether concerned with the regulation of public utilities, or the embarkation upon programs of state ownership, failed. The two measures in the field which met the approval of the voters were the Minnesota measure extending state credit to farmers and the Nebraska act prohibiting the establishment of all banks unable to obtain a certificate of necessity from the state banking board.

HOW THE MEASURES GOT ON THE BALLOTS

It is interesting to note the means by which these various types were placed on the ballots. Fifty-six of the political proposals were constitutional referenda; twenty-one were legislative proposals questioned by the voters, and only nine were initiative measures. Fifty-three were vetoed; twenty-nine of the fifty-six constitutional referenda suffered this fate; eighteen of the twenty-one referenda proposals, and six of initiative measures. The great majority of the financial proposals were also on the ballot because of constitutional mandate. Twenty-eight, five and ten are the numbers which must be attributed to the constitutional requirement, the referenda, and the initiative respectively. It is interesting to note that almost one fourth of these measures were placed on the ballot through the initiative; of these only one carried. Of those placed on the ballot by the referenda, only one was lost; and in twenty of the twenty-eight cases of constitutional amendment, the recommendation of the legislature was followed.

A much smaller proportion of measures dealing with matters of social import were placed on the ballot because of constitutional compulsion. Only six times was this the reason. Ten propositions were on the ballot because of the referenda, and eight because of the initiative. Here also only one measure proposed by the initiative was passed. Nine out of the ten referendum measures, however, were defeated, and there was an even division upon those submitted because of constitutional mandate. Three were passed; three failed

to pass. Of the measures dealing with industrial problems, seven were brought forward through the initiative. Not one of them passed. Two measures were placed on the ballots through the referenda. In the case of one the legislature was upheld, in the case of the other, its action was overridden. An identical situation existed in reference to constitutional measures.

TABLE SHOWING MEANS BY WHICH MEASURES WERE PLACED ON THE BALLOT

Character	*Means*	*Decision*		*Means*	*Decision*		*Means*	*Decision*	
	Constitutional	*Yes*	*No*	*Referendum*	*Yes*	*No*	*Initiative*	*Yes*	*No*
Political	56	27	29	21	3	18	9	3	6
Financial	28	20	8	5	4	1	10	1	9
Social	6	3	3	10	1	9	8	1	7
Industrial	2	1	1	2	1	1	7	0	7

THE TASK BEFORE THE VOTER

Something of the task which confronts the voter can be seen from the nature of the measures. He is called upon to decide all matters from the expenditure of $500,000,000 for the development of water power and electricity within the state of California to fixing the debt limit for school district number ten, Cherokee county, South Carolina. The question of public versus parochial schools is submitted to him for decision in Oregon, and in California the wisdom of a school district in more than one county.

But it is not alone the demand upon the versatility of the voter which is subject to criticism, but the demand upon his time as well. The number of proposals placed before the voter in 1922 averaged five. This in itself is a considerable lengthening of the ballot, and makes a demand upon the voter's time it does not always secure. Unfortunately, the average number of proposals upon the ballot was not the maximum. In Oregon, South Dakota and Washington nine measures were up for consideration; in Colorado, ten; in Arizona, eleven; and in South Carolina, thirteen. Missouri and California exceeded even this. In Missouri nineteen propositions were voted upon. Some consideration should be given here, and also in Arizona, to the fact that a certain number of these dealt with one subject, state reorganization. In California no extenuating circumstances can be brought forward to excuse the thirty varied proposals that occupied the ballot. Thirty measures, and one hundred and forty-four pages of explanation, double columned and finely typed, were thrust upon the voters.

To what extent the referenda, to what extent the initiative, and to what extent constitutional mandate are responsible for the long ballot, the table given below indicates.

THE LONG BALLOT

Critics of the system will wave in the air the California bulletin of information, 144 pages, double columned, finely typed, and ask how much time the voter allots to each measure. Skeptics will point to the Missouri bulletin of information, five feet by three, a mass of finely printed statute, and reiterate the question. *A priori* the situation looks pretty bad. It is only fair, however, to compare the still experimental device of popular referendum with the older institution of representative government. Just how much less consideration is given by the voters of California to the thirty measures before them than is given by members of the New York legislature during the closing days of a session, when measures are being acted upon at the rate of one or two per minute, is an interesting question.

TABLE OF MEASURES PLACED ON BALLOT

	Constitutional Mandate	*By Referendum*	*Initiative*	*Total*
Alabama	4			4
Arizona	8	1	2	11
Arkansas	1		2	3
California	14	5	11	30
Colorado	5		5	10
Florida	4			4
Georgia	4			4
Iowa		1		1
Louisiana	4			4
Maine		1		1
Maryland	5			5
Massachusetts		5		5
Michigan	3			3
Minnesota	2			2
Missouri	3	14	2	19
Montana	2	1	1	4
Nebraska		4		4
Nevada	2	1	1	4
New Jersey		1		1
New York	2			2
North Carolina	1			1
Ohio			3	3
Oklahoma			1	1

TABLE OF MEASURES PLACED ON BALLOT

	Constitutional Mandate	*By Referendum*	*Initiative*	*Total*
Oregon	2		7	9
Pennsylvania	1			1
South Carolina	13			13
South Dakota	4		5	9
Utah	3			3
Virginia		1		1
Washington	3	4	2	9
Wisconsin	3			3
United States	93	39	42	174

It may be suggested that the member of the legislature who votes so hastily follows party decisions and his party accepts the responsibility. Without going into an analysis of the meaning of party responsibility in a legislative body, it is not irrelevant to ask why the rank and file cannot with just as much grace follow the mandate of their leaders at the polls. There seems to be some inconsistency in the statement that although the party assumes responsibility for its decisions upon proposed measures when they come up in a legislative body, yet it may refuse to do so when they are referred to popular decision. Of course the party may assume such an attitude, but in so doing it confesses it is not the responsible agency it has claimed to be.

However, no brief need be held for a system which merely passes on to the ballot box a problem which has been disturbing many of our state legislatures these many years, namely, how to give full consideration to an overwhelming mass of business. Some method of eliminating the trivial and local from the ballot must be found. Just what the voters all over South Carolina know about the debt limit of Christ Church and the changes that should be made therein is difficult to see. . . .

THE VOTE CAST

One measure of the value of the system is the interest it arouses. A comparison of the vote upon measures with that upon the leading candidate gives some indication of its success. It varied from state to state and from measure to measure. The average the country over in 1922 was 61 per cent. It was as low as 25 per cent in South Carolina and as high as 100 per cent in Ohio. The average

vote on those measures which were referred to the voters because of constitutional mandate was only 55 per cent, on those which were referred because of referendum petition 69 per cent and on those which were placed upon the ballot by popular initiative a similar percentage.

There exists a decided variation of interest between states. In South Carolina the average vote was 28 per cent; both Iowa and Oklahoma, where the question was the soldiers' bonus, the vote was 94 per cent. In Michigan where this particular issue was not involved, over 88 per cent of those who voted for the governor voted on the measure proposed. It is a striking thing that the middle west exhibited at least twenty per cent greater interest in the measures before it than did any other section of the country. This may be explained by the fact that the measures which were before the voters there, with the exception of Missouri, were fairly reasonable in number. Especially was there a contrast in this latter respect with the far west. It does not, however, explain the contrast with the east. Nor can this be entirely accounted for upon the nature of the measures proposed. Measures which on their face, at least, made just as little emotional appeal received a higher vote in the middle west than they did in the east.

The character of the measures, however, did play an important part. There was an exceedingly great variation within certain states in which measures of various types were presented. Especially was this true in California. There the vote ranged from 31 per cent to 82 per cent of the vote cast for governor. This variation especially existed in those states in which the questions of prohibition or the bonus were voted upon. In fact, the slight correlation that existed between the length of the ballot and the size of the vote was destroyed by these two questions.

The writer is perhaps entering dangerous ground when he attempts a comparison between the interest indicated by a vote cast at the polls and the interest that is shown by the percentage of those present upon roll-call in a legislative body. In the first place the percentages are not comparable: the one is measured not against perfection, but merely against the vote cast for the leading candidate; the other is measured against a potentially perfect attendance in the legislature. In the second place, the system of pairing upsets the comparison so far as congress is concerned, although to a very much less degree in state legislatures, to those who accept the doctrine of party responsibility, and most of us in some degree or other, do. In the third place, there is greater likelihood that a member of the legislature, although not in attendance upon a roll-call, will be about

his constituents' business, than there is that the average voter will be engaged on public affairs. With all these qualifications, we timidly venture to state the fact that the average vote in congress and in the lower houses of both Pennsylvania and Massachusetts during a period investigated was 66 per cent. The average vote on referendum measures last year, it will be recalled, was 61 per cent; the average vote on initiative measures was 69 per cent.

EVALUATION OF THE VOTER'S WORK

How well has the voter performed his task? To evaluate the decisions is of necessity a subjective matter, one which the student unaware of the details of local situations must approach with trepidation. Some judgment, however, can be rendered.

Most difficult of all to appraise are the measures of governmental reorganization. The defeat in both Arizona and Missouri of extended programs of administrative reorganization is a matter of regret, as is also the extension of the principle of Jacksonian democracy in Louisiana, where the superintendent of schools was made elective. The partial reorganization which the voters approved elsewhere was in all probability desirable. At least the situation is no worse in this particular than if no referendum existed. In furthering the cause of home rule and preventing legislative interference in local affairs the popular referenda did noble service. Whether it did like service in defeating all measures increasing the pay of state officials is a moot question. In general the attitude of the electorate in defeating all measures tending to emasculate either the direct primaries or the initiative and referendum is to be commended.

In matters of taxation no such commendation is possible. With the exception of the repeal of the poll tax in Washington, and the establishment of a mining tax in Minnesota, most of the decisions on taxation measures were reactionary. The income tax was defeated in Colorado, Michigan and Oregon. Classification and the lower taxation of intangibles (which modern economics hold to be the only possible taxation of intangibles) was defeated in California, Colorado and Utah. The defeat of a single tax measure and proposals to tax publicly owned utilities may be thought somewhat to offset these reverses, but not very much. In matters of taxation the voters are evidently considerably behind the legislatures.

Bond issues, both for road building and for bonuses, were quite generally approved. Commendation or condemnation will be rendered according to the personal reaction of the reader. The defeat of the $500,000,000 water power proposition in California was ap-

proved by the Civic League of San Francisco. Here, too, final judgment will be rendered according to the personal reaction of the reader toward state ownership.

The refusal of the voters generally to increase the debt limits is certainly praiseworthy, but the fact that the Ohio voters refused to insert in the state constitution a tax limit cannot be commended, since this action was only incidental to the defeat of the classification law.

To pass on matters of education reorganization without knowing the local situation is impossible. In the matters of prohibition and anti-vivisection the voters were on the whole more rational than emotional. In fact, in the field of social legislation generally, the popular decisions are to be commended. A similar verdict can be rendered of their actions in the field of industry, with two exceptions. In Missouri the defeat of the principle of workmen's compensation does not warrant praise, nor does the Nebraska anti-picketing bill. Some question also arises as to the wisdom of creating a banking monopoly, or the potentialities of one, in Nebraska. This, however, is subject to dispute.

CONCLUSION

The practice of popular referendum in the United States as evidenced by last year's happenings presents, then, the problem of devising a system where by technicalities beyond the capacity of the voter can be eliminated, and trivialities can be dispensed with. Three fifths of those sufficiently interested to vote at all voted upon referred measures, and upon the more important ones the vote was very much higher. Although during the past year the action of the voters in the field of taxation was probably unwise, their decisions in the other phases of the field of finance and in matters pertaining to other walks of life were on the whole sound.

68. THE RECALL IN NORTH DAKOTA[1]

By Dorr H. Carroll

As usually occurs, the measures which the progressives fight for and secure over the agonized protest of the conservatives, are first used by the conservatives as weapons of offence against those who fashioned them.

The recall of officials was a measure initiated by the progressive element in North Dakota after a long and vigorous campaign for

[1] Reprinted from the *National Municipal Review,* January, 1922, by permission of the editor.

that and other measures. It was first used to recall Governor Lynn J. Frazier, Commissioner of Agriculture John Hagden, and Attorney General William Lempke. These men were elected by the Non-partisan League and constitute the state industrial commission which has charge of the state-owned enterprises.

DIFFICULTIES OF STATE-OWNED ENTERPRISES

These enterprises consist of the state flour mills, state terminal elevators and a state home builders' association. The commission also has charge of the Bank of North Dakota. This last named enterprise has been in operation for nearly two years, and has paper profits of $153,000, on a capital of $2,000,000 paid in the shape of a deposit of state industrial bonds. The other enterprises are not in operation to any great extent. The home builders' association has sold some bonds and has made some loans to builders of homes, but the vigorous fight against the operation of the enterprise has made financing of its bonds and mortgages quite difficult, and progress has been slow. One of the state mills was operated at Drake and made some money in the production of flour, but the mill extended a considerable line of credit to the Consumers' Stores Company, a concern operated something on the Rochdale system of coöperative stores. This concern was not a success, and its failure resulted in the suspension of any large operation by this mill for the present.

The vigorous fight against the state-owned industries by the press opposed to the Non-partisan League measures, the continued summer drouths and the general financial stringency combined to make the inauguration of new business extremely difficult, even though it may be fundamentally sound. In addition to these conditions, some very serious mistakes were made. Some of the money of the bank was used, by legal means, it appears, to finance the fortunes of those friendly to the people in power. Some of the loans made were criticized as not good business. There were also a number of appointments which were patently political instead of business appointments.

The most serious error in the operation of the bank was the nature of the business which it undertook. The reason for the initiation of the state enterprises was to relieve the North Dakota farmer of his dependence upon capital and business outside the state for financing his various enterprises. Farming and stock raising do not tend to create great business and financial centers and the state of North Dakota has no large city within its borders. Fargo, the metropolis, has a population of only 25,000 and Grand Forks and Minot, the

two next in size, have but 25,000 together. Thus the farmer desires a state institution of finance which will be available to assist him in his legitimate business needs. His crops are annual and he has no monthly pay check. So he needs long time credits.

The management of the Bank of North Dakota made the error of legislating all the state money, county moneys and municipal funds into the bank, and then loaning these funds (many of which were in the nature of quick liabilities) to home builders, long-time farm loans and to the enterprises of terminal elevator and flour mill construction.

An initiated law passed by the people of the state at the last general election transferred the power of placing the state, municipal and county funds from the state industrial commission to the state, municipal and county officers who originally had that power.

These officers were in a large measure influenced by their local personal friends to remove the funds from the Bank of North Dakota, with the natural result that when the bank was liquidated as far as ready money was concerned, there was no money to continue payment of the demands of the local officers for the transfer of funds to other banks. In addition to this, the general conditions and vigorous propaganda above referred to, participated in by the St. Paul and Minneapolis papers, made it impossible for the bank of North Dakota to realize upon its slow assets. The general business of the state is transacted in St. Paul and Minneapolis and was threatened by the proposed changes in the affairs of the state. In ordinary times and under ordinary conditions these assets are much sought after as good and stable investments.

TACTICS OF THE OPPOSITION

There were two elements in the forces opposed to the Non-partisan League. One element was for pressing its present advantage and bringing on a recall election at once, relying on the discouraged condition of the farmers who constitute the great majority of the state electorate. The farmers need financial assistance, which they do not appear to be able to obtain now through the sources offered by the present state administration, but which is promised to them in the event that a change of administration is had.

The other element was for waiting until the primaries in June of 1922 for further action. This last element was controlled by the friends of Senator McCumber, who has been accused by some of the members of the Independent Voters' Association, the anti-League organization, of being in an offensive and defensive alliance with the

leaders of the League. The reason for their position was the fact that the logical candidate for the governorship was R. A. Nestos, of Minot, who came close to beating the Senator in 1916, and who represents the progressive Republicans of that time. Apparently the Senator is not desirous of letting the power of the governor's office go to one whom he appears to consider as a political enemy in his own party. In the event that the action was delayed the Senator's friends appeared to consider that a better opportunity might be had for a candidate of a more friendly character. Supporting this position were many who thought the best interests of the state were not served by so many elections, and who, though opposed to the League, were of the opinion that the various elements which compose it were in the process of disintegration. A victory at the June primaries, therefore, was considered a foregone conclusion.

SUCCESS OF THE RECALL

The element for immediate action prevailed. Nestos, who is of Scandinavian descent, and who has, as State's attorney of Ward county, made a great reputation as a vigorous officer for law enforcement, was nominated at a convention called to discuss men and means for the overthrow of the present administration. On November 8 he was elected to succeed Governor Frazier, who was recalled. The initiated measures directed at certain of the state's new enterprises failed.

Two things are worthy of note. The character of Governor Lynn J. Frazier is conceded by all fair opponents of his economic ideas, to be above reproach. And R. A. Nestos, his opponent, also a man of high character, has always been very progressive and promised the voters of the state that if elected he would give the state enterprises a fair trial under the operation of competent men who understand such business.

Beard, (4th Ed.), pp. 503–524.
Mathews, pp. 110–139.
Kimball, *State and Municipal Government*, pp. 61–76; 105–128.
Dodd, *State Government*, pp. 502–545.

XVIII

THE ELECTORATE

The movement for democracy and the belief in the competence of the average citizen was first evidenced in extensions of the suffrage. The statesmen of the early national period had little confidence in the voters, but the movement known as the "Jacksonian Democracy" swept away all qualifications for white males over twenty-one years of age. The amendments adopted after the Civil War enfranchised the negroes, and the Nineteenth Amendment gave the suffrage to women.

The problems which have arisen in regard to voting are participation and intelligent participation. Since 1880 the number of voters in national elections has decreased from 82 to about 50 per cent of the electorate (1924). The greatest drive to get out the vote in the history of American elections was made in 1924, and judged by its results it was a failure. The voter is not voting. The reason for this neglect may be ascribed to the difficulties of the task, the over-long list of candidates, the number of technical referenda, and the inability of the negro to vote. Voters have been made conscious by their own lack of preparedness and have stayed away from the polls. General apathy of certain groups has contributed to the decrease, and finally many believe that their vote is useless. "Why throw out one bunch of crooks and only to put in another?—" is the question asked by many citizens. Minorities control, not majorities. All this has happened despite the party appeals, the free ride to the polls, and in some cases the compensation granted for the time lost in voting. Causes of non-voting have been diligently studied, but no effective remedy has been found. Some propose compulsory voting, but in general the proposal finds little support. The voter absorbed in his great job of making a living has no interest in his job of government. Education may improve the situation, but at present it would seem that the educated have been more remiss than the ignorant.

On the other hand, some efforts have been made to eliminate the illiterate voter by means of literacy tests. The southern states have been successful in eliminating the negro. The best literacy test from the standpoint of its content and administration is that of the State of New York, described in one of the articles of this chapter.

The problem remains unsolved and the question now arises: Shall we make voting a great privilege to be striven for, or shall we continue our present idea of universal suffrage?

69. THE VOTER WHO WILL NOT VOTE[1]

By Samuel Spring

The right of free men to rule themselves by the ballot seems celestial in its sanction. All Americans boast of enjoying it. Orators passionately play the gamut of human emotions in praise of it until they reach the final note of ennui. On the Fourth of July we celebrate it proudly as our heritage and our portion in life. Indeed, most of us would die to maintain the right to representation in government.

And yet on the rainy election morning, when "the fate of the nation hangs in the balance," from a fourth to a half of us invariably do not vote. We either oversleep, and thus are too rushed to catch our train, or procrastinate until the afternoon and then completely forget about voting. Some of us even fail to remember that there was any election at all! And many are so indifferent that they fail to place their names on the election lists by registering.

We talk constantly of "pull" in American politics. It is an unhappy, literal truth that the basic "pull"—the "pull" that counts and rules—is the tugging and hauling by the party leaders to drag the recalcitrant, oversleeping, procrastinating voter to the polls. Almost a majority of us are willing to disfranchise ourselves by letting the other fellow's vote decide the election. What does one vote more or less matter, we lazily say.

Most of us at heart are only schoolboys. We know we ought to vote; yet the subtle elixir—or poison—of indolence and procrastination sways us. Because the sly politician, who supplies carriages and automobiles for the voter to ride in and henchmen to corral the voter and place him in the waiting conveyance, can almost always win the election, we have hard-faced political bosses who rule us. We talk bitterly of corrupt bosses and jeer and storm at machine rule—yet we regularly overlook the small detail of throwing the bosses out of power by voting. The bosses know too well that our bark is worse than our bite, so they provide the automobiles and the henchmen—and go through life gayly secure and openly defiant.

Let some ambitious young man who has been placed in office by a boss set out to fight the people's fight. Let him wage a spectacular battle and illumine the heavens with eloquence. Let him pride himself upon his vast achievements and rejoice, like another St. George,

[1] Reprinted from *Harper's Magazine*, November, 1922, by permission of the author and publisher.

at his courage in assailing the dragon. Chances are, unless he is a Roosevelt at the right twist in public affairs, he will find himself, at the crisis, stabbed to death at the polls. The voters may admire and praise him. They may feel proud of him—even grateful. Yet they will not walk a block to vote for him. And the political boss who pulls his voters to the ballot box by his party organization calmly buries the people's friend at the polls. Yet we tell ourselves that he was honest and independent and therefore the machine murdered him.

"He has lots of friends," experienced politicians often say about a candidate. What they mean is that there are many in the community who not merely admire their hero but who admire him so strongly that they will not forget to vote for him. And it is votes that count.

Here in America there has been too marked a tendency to view democracy as a sunlit Arcadia. We have failed to give due consideration to human nature in devising our machinery of government. No educator or parent to-day overlooks the fact that if boys were left free to go to school or not as they pleased our whole educational system would collapse like a house of cards. Fortunately, men are older and maturer than our school children and show less of that delicious, lethal yearning for the primrose path leading to the everlasting bonfire. Yet if we desire to improve American politics, establish efficiency and economy in government, and thus reduce the crushing calamity of high taxes that is overwhelming us, we must increase the number of those who vote—particularly at the less important state and local elections—by penetrating beyond the romance and hopeful idealism of democracy and grappling with the naked realities of human nature.

It is clear today that the cost of government is becoming a serious modern problem. Until recently most of us accepted our government as a noble abstraction. It did not penetrate intimately into our lives. Yet when the Selective Service Act was enforced, and the hand of the government reached into American homes and selected the youngest and fittest for the perilous duel with death, we suddenly came to feel the overwhelming and supreme obligation of the citizens in a free government. So, too, today when so many of us are paying income taxes to both state and nation—and we often have to borrow the money in order to do so—we have come to understand that government and the cost of government is a serious affair.

After all the fond hopes that we had and the oceans of eloquence and promises with which Congress deluged the nation, the Federal

tax burden has been reduced but little. It is probable that in the next few years taxes will increase rather than decrease. Our complex industrial life has made it necessary for the government to afford so much protection to the individual, and the attitude of mind of modern civilization requires so many conveniences, that governmental machinery is becoming extremely involved and extremely expensive. Our street cars for example we consider an elementary necessity. It is probable that, if they are to survive, the taxpayer will have to contribute something to their support. In many places he is doing so already. The tendency of modern civilization is always toward greater complexity and involvement, and this in turn always requires a greater degree of governmental protection and aid. Such increased governmental aid, it must be remembered, will require an increased public expenditure.

Unquestionably, our government today is run, on the whole, at an extraordinary unnecessary expense and involves a dismal waste. The experience we had with the governmental control of the railroads and more particularly the wild orgy of the shipping board indicate this to us clearly. Of course these were war expenditures and the ordinary machinery of government is not so distorted and voracious as were our railroads and our shipping board. Yet they illustrate the extreme of an unquestioned truth. We must, if we are to keep the burden of taxes at what it is, or reduce it in view of the constantly expanding governmental functions, create efficiency and economy in government.

Efficiency and economy are ideals that have been boldly promised in almost every election from the beginning of our government. Today we must begin to translate these terms into reality. Otherwise we shall find ourselves so hardened that life will be intolerable. We cannot have efficiency and economy so long as we are ruled by a class of bosses who exist by virtue of machines which they have built up and which enable them to exploit the public and reimburse their henchmen for their labor. Unless a greater number of the voters go to the polls, and vote without being pulled and hauled there by the bosses through their machine organization, we cannot expect either efficiency or economy in government.

Our present system of absentee voting—of letting the other fellow's votes decide the election because we are so lazy that we feel that one vote more or less does not matter—not only creates but demands a boss system. Our bosses are to be honored. They at least drag a respectable minority to the polls and thus prevent freaks and sinister cliques with no sense of morality from capturing our local governments. Political banditry is all too frequent in American

politics. We are slowly accumulating a picaresque political literature. Men who have the ideals of Jesse James and use lung power and spurious promises instead of bullets, insults and vituperation instead of dynamite, hold too much power. Were it not for our wiser and more discreet political bosses, who are able to drive away and defeat the minorities supporting political bandits, by dragging a sizable minority of votes to the polls, we should have a much larger army of unscrupulous adventurers, collecting even higher taxes from us as tribute and even ransom.

Of course, at times the people revolt. They sweep out the bandits —and even the bosses—from power. And then, having aroused themselves and walked to the polls, they immediately slump off into indifference and forgetfulness again. Once more they forget or are too lazy to walk those few magic blocks. Government by political revolution—as ours so often is in local affairs—is dangerous and grotesquely expensive.

Once create a means by which the vast majority of our voters will always go to the polls, rain or shine, at every election, whether a President or local board of water or gas commissioners are to be chosen, and we shall not only hurl into oblivion political bandits, who live by the vote of small minorities who always vote, but we shall also readily upset and even destroy the rule of our bosses. And if this is not thought desirable, consider the municipal government today of three of our largest American cities—New York, Chicago, and Boston.

The salient objection to bandit and boss rule is not that it is tyrannical and immoral and undemocratic—it is far too expensive. A political boss must compensate his henchmen who lead the voters to the polls on election day. He must maintain a large army of workers for this purpose, not only on election day but throughout the year. Only the amateur reformer thinks he can play politics on election day and forget "fences" and friends throughout the rest of the year. Now this vast political army maintained largely for the purpose of getting out the votes must be compensated. The political boss pays his organization out of the public treasury. Since he can only pay when successful, he pays handsomely. Taxes, therefore, soar, and the voter who will not vote pays and groans. The luxury of not walking a few blocks to vote is far more expensive than he dreams.

What is more, minority rule, or party organization, chills and decays that which is indispensable in free government—independent idealism. The honest man who votes feels that his vote is destroyed by his honest neighbor who does not vote. He loses hope and talks

of "pull" and "graft" and wooden-headed Congressmen. No man of independent instincts and clear vision cares to meddle with politics. He cannot build up an elaborate machinery by political bribery in order to drag voters to the polls; and he knows human nature well enough to understand that comparatively few men can be relied upon to vote regularly because of free will and a mere sense of obligation. And not caring to be slaughtered at the polls, he dreams of Arcadia instead of entering actively into politics.

No wonder our political bandits and bosses in private jeer and sneer at the voter. Public opinion? They consider it comparable to a sleepy, hornless cow, or a decrepit elephant, unaware that it has so much power or strength. "The public? It sulks and groans and threatens—but almost always forgets to vote. So why dread the public?" So speak our politicians, who perhaps have just come from a public legislative hearing on some problem of vital and moving public concern where only a few freaks and windbags have appeared. Thus our political rulers prepare foolish, threadbare political slander and gossip for election day in order to encourage those whom they can drag to the polls, and continue undisturbed in their scarcely hidden contempt for the public and the slothful voter.

The facts are significant. According to the last census, there are in America over fifty-four millions of men and women classed as citizens of twenty-one years of age and over. In the last election of November, 1920, despite the fact that we were keyed up by a great war, and despite the fact that the foreign policy of the nation at issue was of greater importance than any problem which had confronted the voter for a generation, and also despite the large expenditure of money by the two parties, only 26,000,479 voters went to the polls. In other words less than one half of those who could vote, voted. And consider what happens in a local election. On an average, not more than one tenth of our voters attend party primaries. In Boston less than one third of the registered voters cast their vote for city councilmen or school committeemen in a recent minor election. Multiplication of figures is of no avail. These illustrative figures indicate fairly well the prevailing situation.

Of course, the situation is not so bad as it seems at first glance. A great number of the women who had newly received the vote had not had time to register and vote in the last Presidential election. The electoral machinery in many parts of the country was not geared up to so large a representation. Moreover, the number of those men and women who are in our penal institutions or who are disqualified as paupers from voting is considerable. Again many of those eligible to vote were over seventy years of age and physically

unable to go to the polls. A large portion of our population is constantly moving from residence to residence, or traveling about the country, and cannot establish a voting residence. Yet if we deduct ten million voters because of these natural disqualifying qualities, we find that about a third of the remaining eligible voters failed to go to the polls. And the Presidential election of last year represented the high tide in political interest. When an off-year election is held or a municipal or local contest is involved, the vote slumps dramatically. As a rule, a minority decides our municipal and state elections in non-Presidential years in America.

It is futile to speak of methods of enticing the voter to the polls. The time has come when we must cease indulging in the fond hope that we can educate the public through a sense of patriotism to vote. Putting aside the truth of the schoolboy, we must bear in mind the fact that taxes are not collected through patriotism but through compulsion. We found it inadvisable to raise an army in the recent war by voluntary choice. Our courts could not function a single day without our judges holding complete control over the bodies of those who disobey. The Boston Police strike illustrated all too vividly what would happen in any of our communities if for an instant we remove the police who are persistently and everlastingly suppressing the criminal element, and who are never able to do more than sit on the lid. Turn where you will in government, you will find that about the only function which is placed on a purely idealistic, voluntary basis is that of voting. We must look upon government and the right to vote as a serious obligation and place it upon a more practical basis.

Indeed it is not fair to the voter to picture him merely as a slothful, procrastinating dunce who is moved by indolent impulses. Some writers have glibly marveled at the fact that the American public crowds stockrooms in order to watch the stock ticker, jams our streets to see the returns of a world's baseball series, devours extras like a fiery dragon, and yet stubbornly refuses either to go to the polls or to study governmental problems.

Yet on election night we always have a great crowd on the streets anxious to hear the results. When the President comes to town, everybody forgets work, in order to see him. If the number of people who flock to see a Presidential parade would vote at a primary or a municipal election, the result would be widely different.

Those who compare the eagerness of the voter to read the stock ticker or attend sporting events with his failure to vote, overlook human nature. We are living in a distracting, harrowing age, where a great strain is imposed upon us all. Monotony and nervous ex-

haustion are the twin demons of modern-city civilization. We cry out for relaxation, for relief, for excitement before all else. Watching the stock ticker affords us the gambler's joy and relief. Watching the baseball scores and parades is a form of amusement that appeals to those of us who live under the blight of our modern cities.

But voting is a duty. Like going to school, it is the right thing to do, but it is neither interesting, exciting, nor enjoyable. The voter today has problems and troubles enough in order to fight off the undying wolf from his doorstep, and cannot be expected to vote unless he is summoned to the polls in some unmistakable, vigorous manner. We must sadly remind him that he has one more duty added to his burden. He must vote as well as pay taxes. Voting cannot be continued as a side issue or an act of patriotism.

Compulsory voting! That suggestion is no sooner made than there comes to one's mind the difficulty of putting over one half of our voters in jail because they will not vote. And nothing is more futile than to enact unenforceable laws. Are we confronted with the bare wall of reality beyond which we cannot go, and is it impossible by any device to bring the duty of voting in line with the force requiring attendance at school or the payment of taxes? In a word, is there a practical way of enforcing the obligation to vote?

The practical experiment in other countries to increase the attendance at the polls casts a little light upon the problem. Belgium has had compulsory voting since 1892. A voter who fails to go to the polls in the absence of a satisfactory excuse is punished for his first offense by a reprimand or by a fine of from one to three francs; for a second offense within six years by a fine of from three to twenty francs; for a third offense his name is posted in a public place; after his fourth offense his name is removed from the voting list for ten years, he is fined, and he is held ineligible to hold any public office. Professor Leon Duprez, formerly of the University of Louvain, who has made a thorough study of this problem in Belgium, has concluded that this system has been very successful in Belgium. During the last twenty years only 6 per cent, and at times even as low as 4 per cent of the voters have failed to go to the polls. When it is remembered that many electors die or move or suffer from some other disability between the time that the election lists are made up and the day of election, the conclusion seems reasonable that from only 2 to 3 per cent of the voters in Belgium failed to vote.

On the other hand, Spain has had a system of compulsory voting since 1907, which consists of publication of the delinquent voter's

name for a first offense, and an additional tax levy of 2 per cent upon his tax for his subsequent offenses, which has not tended to improve the situation. Probably one third of the residents of Spain who have the right of suffrage do not vote. Yet a most significant distinction must be made between places like Catalonia, the Basque provinces, and Navarre, where the people are better educated and where 90 per cent of the electoral body attend the polls—a surprisingly high average—and such other regions as Andalusia, where illiteracy prevails and where from only one third to one half of the people vote. In Austria since 1907 several provinces have adopted compulsory voting with fair success. In Switzerland, in the cantons of Zurich, Schaffhausen, St. Gallen, Aargau, and Thurgau, the system of compulsory voting by fining prevails, with the result that an average vote of 70 to 80 per cent is cast, which is a higher percentage than that which prevails in other cantons.

It must be remembered that in most of the Catholic countries in Europe elections are held on Sundays, which makes it easier for the people to go to the polls. Yet the tendency today in America is to have election day a holiday, and this does not improve the situation markedly. No country in Europe has such frequent elections as America. If the referendum, recall, and direct primary are to be applied as their advocates desire, we shall have frequent elections indeed in America. The duty of attending all these elections is an exacting but not a heavy burden. If we believe in the vote of the people, then we must be practical enough to be willing to expect the people to vote at all elections.

Should we adopt a system of fines in this country, or should we adopt a system of publishing the delinquent voter's name? Illinois has a rather amusing provision that only those who refuse to vote are forced to do jury service duty. Yet the efficient administration of justice requires able jurymen. Such a provision adversely affects the courts and the administration of justice. In Kansas City, Missouri, provision was made that a poll tax of two dollars and fifty cents should be levied upon every male citizen of legal age excepting those who voted. This the Missouri Supreme Court held unconstitutional in an unsatisfactory decision that seems without merit.

The practical approach to compulsory voting is to link it directly with the payment of taxes. Those who fail to vote increase the cost of our government, and thus increase the taxes which must be paid by the conscientious citizen. The burden of taxes is getting to be a serious question, and the most desirable way to encourage more efficient government is to link such encouragement directly with the payments of taxes. Today the income tax is enforced by the federal

government and prevails in many of our states. It is rapidly spreading throughout the country. Under the income tax a certain amount, usually one thousand dollars in the case of a single person and two thousand dollars in the case of a married person, is deducted from the taxpayer's income before taxes are assessed.

Would it not be simple to arrange to deduct, say, only one half of this exemption, or three fifths, from the income of the taxpayer who does not vote at all elections simply because he is slothful or forgetful? The difficulties involved of checking up would not be great, because the tax collector could take the voting list, and in the absence of adequate explanation from those who do not vote, simply increase the tax bill. This procedure would seem to be more desirable than adding a penalty by way of a percentage of a tax, because taxes vary and it would be perhaps unfair to allow a wealthy man ten or fifteen times greater credit for his voting than a man of small income. To decrease uniformly the amount that can be deducted from the taxpayer's income before the tax is assessed, is a simple, fair, and equitable method of enforcing the vote. It is also possible where a state income tax does not prevail, to follow the Missouri plan of imposing a poll tax which shall be paid by the voter who does not vote.

The details of such a change in our electoral machinery must be altered in view of local conditions. For example, it would be impossible to apply compulsory voting in any form to primary elections, because the state cannot force a man to join a party and take part in a party vote. A uniform plan therefore should not be suggested. But the fact remains clear that if we are going to have compulsory voting in any form, it can best be worked out by a method whereby the voter who refuses to vote is denied certain exemptions under his tax, which should be enjoyed only by those citizens who walk to the polls and do their duty on election day. By some such method we shall greatly increase the number of votes cast and decrease the influence of our political bandits and bosses who are piling mountains of taxes upon taxes, because of their inefficiency. This burden in truth is tribute which they exact in order to maintain their political armies who get out the vote.

Of course, bringing the voter to the polls alone is not sufficient. Intelligent voting is necessary. Voters must make themselves familiar with the issues and cast a helpful ballot. The question of information on political issues and the commercialism and venalism of our press are grave American problems. Yet they represent additional difficulties, apart from the question of compulsory voting. Fortunately we have in this country a relatively small proportion of illiteracy. And patriotism is abundant, although sufficient energy to

vote is not. As soon as the voter is forced to vote he will give some consideration to how he will vote and will study our public questions more carefully.

There are those, needless to say, who will feel that voting should be kept upon a voluntary basis and that to make it compulsory or to link it up with the payment of sordid taxes will chill patriotism and destroy American ideals. Those who cling to that view are to be admired for their faith. They can only keep from being jarred by not observing who fails to vote. They refuse to face the grim realities of modern government. They cling to their ideals and thereby allow bandits and bosses to rule.

The weight of modern taxation is becoming so great that it is beginning to be almost a spiritual problem in the effects that it has upon the individual's life and his happiness. It is beginning to discourage initiative and deaden ambition. It is the most potent force rushing us toward socialism, if any force can bring us there.

So we are rapidly approaching the time when we must bring voting into line with all the other functions and duties of government, and thus rigorously and with grim determination, set out to decrease the cost of government. Government can only be made both beneficent and inexpensive when we strangle our political bandits and bosses and establish genuine free government. To do that we must have the ballot box represent the will of the majority no matter how uninteresting the problem may be. The voter may lag on the way to the polls like the schoolboy; he may creep with snail-like pace. But when we force him to the polls instead of letting him turn into other paths, voting, like education, will have a firm basis founded upon the realities of human nature.

70. THE VOTER RESIGNS[1]

By Harold F. Gosnell

The resignation of the American electorate dates back to the middle of the nineties. Only a portion of the eligible voters in this country had given up the careful consideration of election day choices prior to that time. In the fifties and sixties there were valiant election day battles over the slavery controversy. The formation of the Republican party and the ruthless methods that it employed to maintain itself in power during the reconstruction period challenged the fighting spirit of the voters in all parts of the country.

[1] Reprinted from the *New Republic*, October 21, 1925, by permission of the author and publisher.

At the end of the reconstruction period the two major parties in this country were very evenly balanced. A switch of a few votes from one of the two great parties to the other in one of the doubtful states would turn the election. Cleveland polled more votes in 1888 than Harrison, but he lost the presidency because the technical rules of the game counted him out in the electoral college. In none of the presidential elections that came in the period from 1876 to 1896, did the combined vote of the losing parties fall below 50 percent of the total vote cast. Those were the days of heated party contests, when the interest of the voters was kept at a high pitch. In 1896, the voters in all parts of the country were stirred by the dramatic battle which Bryan waged with the Republican party managers, but a majority of them sold out their suffrage rights about the time of the election. The tendency of the Democrats in the Solid South to neglect national elections became more marked and the great bulk of the northern voters resigned their positions as the selectors of the official personnel of their governments in favor of the Republican party managers.

Did the northern voters really resign their jobs with the election of 1896? Did not many of them throw over the traditional party traces in the elections of 1912 and 1916 and resume once more the exercise of their sovereign rights? It is true that a large proportion of them were moved by the challenge that Wilson presented in his second presidential campaign, but the elections of 1920 and 1924 have demonstrated that the 1916 election left no permanent impress upon their habits. With the exception of the eight-year period of Democratic control that resulted from divided Republican counsels, an overwhelming majority of the voters in the most populous sections of the United States have endorsed Republican candidates and Republican policies ever since 1896. The voters of the United States have literally resigned their jobs. Messrs. Schlesinger and Erikson have demonstrated by a careful analysis that there has been an increasing tendency on the part of the voters in this country to absent themselves on election day. This tendency has been especially marked since 1896. A sufficient number of the voters in this country have such implicit faith in the ability of the old line party managers to run their political affairs that they have ceased to entertain the thought of alternatives.

An analysis of the presidential elections of 1920 and 1924 shows that in those states where the party majorities are the largest the number of non-voters is the greatest. Thus, in the state of Pennsylvania, two-thirds of the national electors vote a straight Republican ticket and less than one-half of the eligible voters come out at

presidential elections. In a state like Indiana where the Republican party polled under 55 percent of the total vote, three-quarters of the eligible electors came to the polls in 1920 and 1924. The adult citizens of the Solid South were among the first to resign their duties as electors. They did so shortly before 1896, when it became clear that the Democratic party managers could assure the supremacy of the white aristocracy in their territory. The Democratic voters of the cotton belt are more completely resigned to their fate than are the Republican voters of the coal and oil regions. In South Carolina, 98 percent of the citizens that came to the polls in 1924 were Democrats, and 94 percent of the eligible voters stayed at home on the November election day. The voters and the non-voters in this state evidently have implicit faith in the justice of existing political arrangements. The Republican managers in the North undoubtedly hope that the influence of their continued electoral successes will build up a similar childlike faith among their constituents. While the northern managers have sufficient funds to get out their voting automatons on election day, it is nevertheless much to their advantage to be able to devote these funds to other purposes.

What can be done about this wholesale submission on the part of the American electorate to the tender mercies of the party managers? If I were a party manager, I would suggest a new method of voting. Let the votes of those who are satisfied with existing political arrangements be automatically counted. On election day only those who had changed their views or those who were voting for the first time would have to come to the polls. A careful official canvass of the traditional voters would be the only check necessary upon their attitudes. This system would save both the voters and those who customarily urge the voters to exercise the franchise much time and trouble. Those who were dissatisfied with the present regime could come to the polls and vote if they wished. This arrangement ought to satisfy the kickers. Of course, it would be hard for the bolters to make any impression upon the great mass of traditional voters, but conditions would be no worse than they are today.

For those who are not party managers, the present outlook is less encouraging. In times of prosperity, the voters are not looking for changes. La Follette had no argument against the rising price of wheat. The advent of the twentieth century marked a period of unprecedented prosperity in this country. By an act of fate, the managers of the Republican party were able to convince the great body of voters in the industrial regions that the success of their party was tied up with the prosperity of the country. They did not furnish the natural resources, but somehow they helped to exploit them!

The symbol of the full dinner pail is an alluring one and it seemed to work as well in 1924 as it did in 1896. The progressives have two hopes. One is that the Republican leaders will again quarrel among themselves as they did during the eight years following 1910, and the other is that there will develop in this country a political combination of farmers and workers based upon a rational calculation of interests. The Progressive vote in 1924 did not come up to the expectations of many of those who backed the movement, but La Follette received a larger percentage of the popular vote than any other minor party candidate since 1860 with the exception of Roosevelt in 1912. La Follette did not have any George W. Perkins to act as his Moses. A limited study which I have made of the influence of a non-partisan mail canvass to get out the vote in certain selected areas of Chicago, indicates that if La Follette had had money and an elaborate party organization, his vote would have been much larger. As it was, in the states where La Follette made his best showing, between 60 and 70 percent of the eligible voters came to the polls a year ago. The figures compiled by the get-out-the-vote committee of the National Association of Manufacturers indicate that in practically all of these very states there was an increased voting interest shown at the polls over the performance of 1920. The resignation of the American electorate is not quite complete.

71. THE NEW YORK STATE LITERACY TEST[1]

By F. G. Crawford

There has been of late years a growing demand for constitutional provisions and legislative enactments that will provide for a more intelligent ballot. Although isolated attempts to solve this problem appear before 1890, it was not until that date that the commonwealths of the United States made any progress in literacy tests for voting. Twenty states now have some form of literacy test, provided for by their constitution or by legislative enactment, or have left the legislature free to act if that body so chooses.

Connecticut passed the first reading test in 1855 and Massachusetts the first reading and writing test in 1856. Colorado followed in 1876, the constitution of that year providing that the legislature should establish by law an educational test as a qualification for vot-

[1] Reprinted from the *American Political Science Review,* May, 1923, by permission of the editor.

ing, which was not to go into effect until 1890 and would not disqualify any then qualified voters. The provision was of no importance, for the legislature of that state has never acted under the power granted.

The educational qualification was not important until 1890 when four states inserted provisions in their new constitutions, the real purpose being to limit the negro vote. The following states now have as a part of their constitution or by law some provision for a literacy or educational test: Alabama, Arizona, California, Connecticut, Delaware, Georgia, Idaho, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, North Carolina, North Dakota, Oklahoma, South Carolina, Texas, Virginia, Wyoming, and Washington.

The provisions differ in detail in each state but certain groups have general principles in common. The following states provide that persons shall be qualified to vote if they can read or write any article of the state constitution: Alabama, Georgia, North Carolina, Oklahoma, and South Carolina; while the states of California, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, and Wyoming provide for voting if the voter can read the constitution and write his own name. Arizona grants the suffrage to those who can read the constitution in the English language in such a way as to show that they are neither prompted nor reciting from memory. In Texas the voter must explain in the English language how he wishes to vote. Mississippi, Louisiana, and Virginia call for a satisfactory reading or understanding of the constitution and thus maintain the loop-hole through which election boards may exclude negro voters. The state of Washington grants the privilege to those who can read and speak the English language. The constitutions of Idaho and North Dakota grant their legislatures authority to make educational qualifications but no action has been taken under this provision.

At the general election of 1921, an amendment to the New York constitution was passed changing Article II, Section 1, which now states "After January 1, 1922 no person shall become entitled to vote . . . unless such person is also able, except for physical disability, to read and write English; and suitable laws shall be passed by the Legislature to enforce this provision."

The legislature of 1922 provided two methods to test the literacy of new voters, tests by election boards and the certificate of literacy. For the first method, there were prepared by the secretary of state one hundred extracts of fifty words each from the constitution of the state for reading, and from these fifty words are to be selected ten words to be written. These tests are to be given by election boards on registration day in communities of five thousand or over, and on

election day for those under five thousand where personal registration is not required.

New York is original in that it has created through its board of regents a certificate of literacy to be given to voters after an examination has been taken. The committee of the regents decided to set the test at the requirement of the fourth year. This decision is tentative and the difficulty will increase gradually. The whole plan in the regents test is to read and write intelligently. The writing on the regents test is to determine the voter's ability to convey meaning in writing and is a reading-writing examination rather than a reading and writing test.

A sample selection with questions follows: "A vote is the expression of one's will as to men seeking office or bills proposed for the good of the people. A vote may be taken in three ways, by voice, by show of hands, or by slips of paper. In political matters, the ballot is generally used. There is a sheet of paper on which the name of the candidate for office is printed. The voter puts a mark opposite the name of the man he thinks ought to be chosen for office. He must be careful to mark the ballot properly. Ballots not properly marked are not counted."

1. What is the expression of one's will as to men seeking office called?
2. For whose good are bills said to be proposed?
3. In how many ways may a vote be taken?
4. Name one way in which a vote may be taken.
5. What is the sheet of paper used in balloting called?
6. What does the voter put opposite the name of the man he wishes to vote for?
7. What is printed on the ballot?
8. What happens if the ballots are not properly marked?

Instructions are read to the candidate at the time of taking the test from the pamphlet of instructions as follows: "This is a test to see whether you can read and write English. On the other side of this sheet there is a selection for you to read. Under the selection there are some questions for you to answer. First, read the selection. Next read the first question. Then go back and read the selection until you find the answer to the first question. Usually the answer will be only one or two words. When you have found the correct answer, write it on the dotted line after the first question. You need not answer in a complete sentence. Write answer as plainly as you can for this is a test of both reading and writing. Answer all the other questions in the same way. When you have answered every ques-

tion, read the selection over again and make sure you have no mistakes. If you have any questions, ask them now."

A certificate of literacy may be issued to all applicants who show that they have completed the fifth grade in the public schools of the state, or to those who have completed work equivalent to the fifth grade in evening, private, or parochial schools of the state, as well as to those who successfully pass the examination described above. The law provides that opportunity shall be given to secure the literacy certificates in the two weeks preceding registration. School officials are in charge.

The experiment is a novel one in its attempt definitely to connect up the school authorities with the qualifications for voting. The Americanization movement in New York state has furnished aliens the opportunity to learn English when applying for citizenship and an equal chance to comply with the state educational qualification for voting.

72. ABSENT-VOTING LAWS[1]

By P. O. Ray

It would be hard to find another reform connected with our election system that has spread so rapidly and attracted so little public attention as the movement which has practically put an end to the virtual disfranchisement of large numbers of intelligent citizens in civil life merely because, for one good reason or another, they could not appear in person at their precinct polling places on the day of a primary or an election.

Since the enactment of the Vermont law of 1896 and the Kansas and Missouri acts of 1911, one state after another has enacted legislation for the benefit of absentee voters until at the present time not more than four states[2] appear to be without any such laws. A few states extend the privilege of voting *in absentia* only to persons in the military or naval service; other restrict the privilege to civilians; while still other laws expressly or impliedly, cover both classes.

Since 1918, two states have adopted constitutional amendments empowering their legislatures to enact absent-voting laws, New York

[1] Reprinted from the *American Political Science Review*, May, 1924, by permission of the editor.

[2] Connecticut, Georgia, South Carolina, and Kentucky. An absent-voting law was passed in Kentucky in 1918, but was declared unconstitutional by a court of that state.

(1919)[3] and California (1922); and the legislatures of seven states have enacted such laws for the first time. No state, so far as the writer can discover, has repealed its absent-voting statutes, although one or two military absent-voting laws, enacted during the period of the World War, have expired by self-limitation. The states in which absent-voting legislation has recently made its initial appearance are Alabama,[4] and Utah[5] (1919); Mississippi[6] and New York[7] (1920); Louisiana[8] and Arizona[9] (1921); and California[10] (1923).

California's law expressly extends the privilege of voting *in absentia* to both civilians and to persons in military or naval service; but the other new laws are apparently intended solely for civilians. Arkansas supplemented her absent-voting law of 1917[11] with a new statute in 1923 for the benefit of soldiers, sailors, and marines.[12] On the other hand, Pennsylvania, Nevada, Delaware, Massachusetts, and West Virginia have recently added to their military absent-voting laws new acts applicable to civilians.[13]

The new laws of Arizona, Delaware, Louisiana, Mississippi, New York, Utah, Wyoming and West Virginia all conform closely to the North Dakota (1913) type of absent-voting legislation, under which a ballot marked *in absentia,* or in anticipation of absence, is counted by the election officials in the voter's home precinct. The new Wyoming Act, repealing the Kansas (1911) type of law passed in 1915, and the Vermont law of 1919,[14] which superseded the earliest of all our civilian absent-voting laws (1896), also conforms to the North Dakota model; and the same is true of most features of the new California and Pennsylvania laws, except that the counting of absent-voters' ballots in these two states is deferred until the official canvass takes place after a primary or an election. In this respect

[3] A further amendment was submitted to New York in 1923, extending the absent-voting privilege to inmates of soldiers' and sailors' homes.

[4] *General Acts of Alabama, 1919,* No. 75, 620.

[5] *Laws of Utah, 1923,* Ch. 99.

[6] *Laws of Mississippi, 1920,* Ch. 155; *Ibid., 1922,* Ch. 256.

[7] *Laws of New York, 1920,* Ch. 875.

[8] *Acts of Louisiana, 1921,* No. 61.

[9] *Laws of Arizona, 1921,* Ch. 117.

[10] *Statutes of California, 1923,* Ch. 283.

[11] *Public and Private Acts of Arkansas, 1917,* I, pp. 951 ff.

[12] *Ibid., 1923,* Act 619.

[13] *Laws of Pennsylvania, 1923,* No. 201; *Laws of Nevada, 1921,* Ch. 80; *Ibid., 1923,* Ch. 117; *Laws of Delaware, 1923,* Ch. 103; *General Acts of Massachusetts, 1919,* Ch. 289; *Acts of West Virginia, 1921,* Ch. 55.

[14] *Laws of Vermont, 1919,* No. 7; *Ibid., 1921,* No. 4; *Session Laws of Wyoming, 1923,* Ch. 101.

the California and Pennsylvania laws more closely conform to the Kansas (1911) statute, but both make more adequate provision for safeguarding the secrecy of the ballot.

The Nevada and Delaware laws, and also an amendment to an earlier (1917) Idaho law [15] extend the privilege of absent-voting to persons kept away from the polls by reason of illness or physical disability. This brings the number of states making express provision for sick and disabled voters up to at least six, Wisconsin, Indiana, and Iowa being the other three. It is in this direction, doing tardy justice to sick or disabled voters, that most remains to be done in the great majority of the states in perfecting absent-voting legislation.

The laws of New York, Pennsylvania, and Wyoming are the only recent measures which, like earlier legislation in Virginia (1916) and Tennessee (1918), expressly permit absent-voting in any part of the United States. By a recent amendment to her statute of 1917, Montana also comes within this class; [16] and perhaps West Virginia also, where absentees are required to be outside the state in order to take advantage of this form of voting. Louisiana, at the other extreme, requires the prospective absentee to mark his ballot in the presence of the county official who issues it. In other states voting outside the voter's home state may be authorized by implication, for most states merely specify that the voter must be beyond his own county or precinct. Utah has amended the act of 1919 so as to confine absent-voting to persons who are outside their own counties and "not within twenty miles of their voting precinct." [17] A similar amendment, with twenty-five miles as the limit, was adopted in Washington (1923).[18]

Absent-voting under the New York and Arizona statutes is restricted to general elections, and the same is true of the recent Massachusetts and Delaware laws. The other new laws cover both primaries and elections; and an amendment to the Minnesota law of 1913 (which applied only to general elections) and the new Wyoming law now permit absent-voting in primaries [19] in those states. An Oregon amendment act enlarges the list of eligible absent-voters to include railway employees.[20]

[15] *Idaho Session Laws, 1923,* Ch. 57.
[16] *Laws of Montana, 1923,* Ch. 151.
[17] *Laws of Utah, 1923,* Ch. 99.
[18] *Laws of Washington, 1923,* Ch. 58.
[19] *Minnesota Session Laws, 1923,* Ch. 108.
[20] *General Laws of Oregon, 1923,* Ch. 53. Acts amending previous absent-voting laws in comparatively unimportant details, were also passed in Florida (1920), Virginia (1922), and Texas, (1923); see *General Statutes of Florida,*

Nevada has introduced two or three innovations in connection with absent-voting. (1) Applications for an absent-voter's ballot may now be made by telegram, as well as by letter or in person. (2) A "new and independent section" has been added to the act of 1921, which requires any person who has been "physically and corporeally" (!) absent from his voting precinct for six months immediately preceding the date of an election in which he wishes to vote *in absentia* (except students and persons in military or naval service) to reregister in person before he can obtain an absent-voter's ballot. (3) All persons, furthermore, who have voted *in absentia* at the last preceding general election are also required to reregister in person; otherwise, their names are to be stricken from the voting lists. These last two requirements will undoubtedly occasion a good deal of inconvenience to certain classes of absent voters, especially those who happen to hold positions under the federal government.

Nevada also appears to be the first state to authorize voting by mail by persons who are not absent from their home precincts and are not kept from the polls by sickness or physical disability.[21] This privilege is restricted, however, to voters who reside in precincts having less than twenty voters. The main purpose of this law evidently is to avoid the trouble and expense involved in establishing polling places and appointing election officers in the sparsely settled portions of the state. Such "mailing precincts" are to be designated by the various boards of county commissioners in advance of elections and primaries, and no polling places are to be established or polling officials appointed in such mailing precincts. A voter residing there may do one of two things: he may apply to the county clerk for an "official mailing ballot" which he must mark secretly and without assistance, and return to the county clerk not less than ten days before the day of the primary or election; or he may appear in person before the "central election board" at the county seat, while the polls are open, and there cast his ballot in person. The central election board, just mentioned, is appointed in each county by the board of county commissioners, to receive and count the ballots mailed to the county clerk by the voters of the mailing precincts in the county. The rules governing opening and counting the mail ballots are so drawn as to protect the secrecy of the ballot.[22]

1920, I, 368 ff.; *Virginia Acts of Assembly, 1922*, Ch. 505; and *General Laws of Texas, 1921*, ch. 113; *Ibid.*, Ch. 149.

[21] *Laws of Nevada, 1923*, Ch. 207.

[22] It is reported that the State Tax Association actively sponsored a bill in the Montana legislature in 1923, which provided for the adoption of a much more comprehensive system of voting by mail in that state. Student of election systems will find much interesting material relating to absent-voting and

The provincial legislature of Ontario in 1923 passed an act which enables railway employees and commercial travelers who expect to be absent on the day of the annual municipal election to vote before the regular polling. Instead of providing for a system of voting by mail, the Ontario law requires a poll to be held at the city or town hall from 9 a. m. to 5 p. m. for three days (Sundays excepted) immediately preceding the election.[23]

73. THE CASE FOR P. R.[1]

THE NEED FOR REPRESENTATIVE GOVERNMENT

In spite of the great efforts made in this country to throw off "machine" rule, establish democracy, and eliminate jobbery, favoritism, and waste in our governments, we are still only part way to these goals. Many of our public officials still sacrifice the interests of the public to those of the party "machine" to which they owe their places. The "machine" still lives on jobs for the faithful workers and on profitable opportunities for speculation and alliances with privilege-seekers for those in command. Our city councils and state legislatures—to go no higher—elected under the old system are not chiefly made up, as they should be, of the real leaders of the various elements among the voters. They are not generally looked up to or regarded as dependably representative of the best interests of the public.

Those who imagine that the failings of democracy can be wholly cured by more legislation are, of course, dreamers: a complete cure would call also for such a deeper change as improved civic education, and even for such a basic one as better breeding of the citizens themselves. But those also are unpractical who, like Mr. Graham Wallas, discard as useless, without due discrimination, both the real and the quack remedies that legislation can give us. Whether or not a horse can draw a house depends, it is true, largely on the strength of the horse, and other things being equal it is absurd to expect a weak horse to draw as much as a strong one; but on the other hand a horse may be able with the aid of wheels to draw a house which he could not draw without them.

It has been shown by reason and proved by experience that a change in our methods of electing representatives makes it possible

other forms of voting by mail in the publications of the Mail Ballot Movement of Chicago, mimeographed and distributed by the More Democracy Press, 104 West Monroe St., Chicago.

[23] *Statutes of Ontario, 1923,* Ch. 44.

[1] Reprinted from the *Proportional Representation Review,* July, 1925, by permission of the publisher.

for ordinary voters, without any change in their natures, to elect councils and legislatures incomparably more representative than those they have elected under the old methods. And it can be shown also that when the bodies thus elected are given control of the rest of the political mechanism, as under the city manager plan of government, the will of the voters can bear effectively on the dollars their public servants spend and the services they render. Hitch the voters to the "representative" bodies right and their wills can exert a straight and effective pull for cleaner streets and streams, better schools and roads, more numerous playgrounds, parks, and bathing pools, more even-handed justice, and scores of other things that they care about greatly. This article is a plea for that greatest of all political devices, which most of our communities have never yet tried, representative government.

WHAT REPRESENTATIVE GOVERNMENT REQUIRES

One of the objects of voting is to select from among several measures proposed the one that is to be adopted.

Another object of voting is to make a selection among rival candidates for an administrative position.

Finally, there is an entirely different object to be carried out by voting. This is to *make up a body fit to make decisions on behalf of the voters,* in other words to elect a representative, deliberative, or policy-determining body such as the House of Representatives, a state legislature, or a city council.

Though the principles of democracy require that the decisions made in a deliberative body should be made by majority voting, they by no means require that the body itself should be made up by that method. In making up such a body, indeed—as has been recognized generally, though until recently only very confusedly—each member's right to a seat should rest on his being the choice not of a majority or of a plurality of all the voters represented but merely of a sufficient share of them.

Consider, for example, the election of a committee of five by fifteen voters. If the fifteen could be segregated into three who preferred Brown to all others, three who preferred Smith, three who preferred Jones, three who preferred White, and three who preferred Black, obviously the truly representative committee of five must be composed of Brown, Smith, Jones, White, and Black. The system of votes needed, therefore, for the selection of the five, is not a system of *dividing* the fifteen but a system of sorting them into unanimous quotas of three, a system, in other words, of *condensing* the fifteen voters into five spokesmen.

THE OLD SYSTEM FALLS SHORT

In carrying out this object we have blundered, in the past, badly. For example, to elect a city council of nine we usually divide the city into nine wards, each containing about a ninth of the population, and let each such ward elect one of the councilmen. Now, arithmetically that is good; but governmentally it is bad. It is right to let each member of the council—each ninth of the whole body—to be elected by a ninth of the population, but it is wrong to prescribe, as the ninth that must elect each member, the ninth which happens to live inside of an arbitrary district line. Such people do not agree. They cannot be represented, in any true sense, by a single person. *So many people who sleep inside of an imaginary line on the map*—that is not the sort of constituency that ought to be condensed into a spokesman. It should be *so many people who want the same spokesman.*

Having cut up our city or our state into single-member districts, we have nothing left to do, of course, but to let each district elect its members by majority or plurality vote. And so we get our old system of representation, which has been accepted blindly, year after year and generation after generation, in spite of its absurdity in theory and its failure in practice.

The election of representatives by plurality or majority vote from single-member districts means that in each district all the ballots that are not marked for the one person who gets most votes are thrown away. These wasted ballots, legally marked but without the least effect on the make-up of the representative body, usually amount to a large percentage of the whole number cast. For example, in the election of the Cleveland council in 1921 under the ward system 69,900 of the 130,207 valid ballots cast had no effect on the result.

Sometimes this waste of ballots results, even where there are only two parties, in the minority party winning a majority of the seats. Here is an example:

Election of Congressmen, Rhode Island, 1922

District	Democratic Votes	Republican Votes	Democratic Plurality	Republican Plurality
I	21,935	25,860		3,925
II	23,680	26,247		2,587
III	36,147	21,581	14,566	
Totals	81,762	73,688	14,566	6,512

Members Elected: Democrats, 1; Republicans, 2.

In 1924 the Republican Party polled a majority of the Congressional votes both in New York and in Missouri but in each case elected fewer Congressmen than the Democrats.

It is even possible for a minority party to elect not merely a majority of the members, but all of them. This occurred in the election of Congressmen from Indiana in 1912.

Election of Congressmen, Indiana, 1912

Party	Votes	Percentage of Total Vote	Congressmen Elected
Democratic	291,288	45.5	13
All other parties	349,546	54.5	0

In 1918 the Democrats cast nearly the same percentage of the Indiana vote as in 1912, but this time, instead of electing all the Congressmen, they elected none at all. The reason for this change was that the Republicans were divided into two parties in 1912 and united in 1918. They were not necessarily more united in reality in the latter year. Experience had taught the Progressive Republicans that by nominating candidates of their own under the single-member district system they did not elect them but merely elected Democrats, whom they wanted least of all.

This brings us to another fundamental defect of the old system: it not only distorts the wishes of the voters as expressed, but also discourages a true expression. Usually the voters, even when choosing among four or five candidates for one place, have not been allowed to express on the ballot more than one choice. This means that they do not dare to vote for—or even nominate—the candidate they like best unless they think he has some chance of winning. To vote for a candidate who has no chance is to throw the vote away. A large percentage of all the votes cast under the old system, therefore, frequently more than half of them, do not express the real wills of the voters at all. And this is true of the primaries as well as of the final elections. No wonder the ordinary voter feels helpless at the polls and our public affairs are controlled by the "machines." When you go to market you dare to ask for what you really prefer—let us say asparagus—even though you think it is probably not available. Why? Because if there is no asparagus you can at once ask for string beans, your second choice; and if there are no string beans either, for your third choice; and so on. If you were limited by law to the expression of only one choice, you might ask for cabbage, not because you preferred it, but because you thought it most likely to be in stock. In our elections we get political cabbage *ad nauseum*

because we vote for it; and we vote for it, in spite of the fact that we do not want it, because we are made helpless by the limitations of the ballot. Until we have sense enough to give ourselves the same freedom on the ballot that we have in ordering vegetables at the grocer's we deserve to eat political cabbage indefinitely.

THE REMEDY—P. R.

The remedy has been not only discovered but thoroughly tested. And it works—not perfectly, of course, but as well as other things that depend on ordinary men and women. The new method of voting to which we refer is the single transferable vote applied in districts electing several members each, otherwise known as the "Hare system of proportional representation."

Proportional representation or "P. R.," as its name implies, makes it easy for any group of like-minded voters to get representation in proportion to its voting strength.

Any method of making nominations may be used in connection with the system; but as soon as the effects of the system in the election itself are fully understood, it will be realized that with it no primary election is needed. A simple method of nomination by petition is all that is required, and all that is used where the system has been adopted.

The fundamental principles of the system can be grasped most easily, perhaps, in connection with an election without ballots. Imagine the election of a council of five members by 600 voters, say, carried out in a park. The rules for the voting are announced. They are as follows:

1. To vote, stand beside the banner of the candidate whom you prefer.
2. Change your vote as often as you please until the polls close.
3. When the polls close the five candidates who are surrounded by the five largest groups of voters will be declared elected.

The Hare system has been called complicated. Yet those simple rules cover all its fundamental principles. With nothing more than those rules as a guide and without any further word or act on the part of the officials the election will probably carry itself through correctly according to the principles of the single transferable vote.

Each voter would go at first to the banner of the candidate he liked most of all.

Then someone would discover that 101 voters were enough to insure election. However the voters might eventually arrange themselves, it would not be possible for more than five candidates each

to get as many as 101 out of a total of 600.[2] If 110 voters had gathered about one candidate's banner, 9 of them would move on to help other favorite candidates who were not yet sure of election.

When all the voters had grouped themselves around candidates who actually needed their support, the smallest group would break up: rather than waste their votes, they would support others who had a chance of election. Then other groups would break up one by one for the same reason. Each group would stay together so long as there was a possibility of gaining from smaller groups, but when it was the smallest one left each member of it would go to help the candidate he liked best among those still in the running who needed more votes. This process of gradual elimination would continue until there were only six groups left, when the smallest of the six would concede the election to the other five.

In this way the greatest possible number of voters would have a real share in the choice. Each of the five successful candidates would represent an approximately equal share of the voters who were united, under the circumstances, in wanting him as their spokesman.

If this method of electing a representative council is fair—and who would deny it?—the Hare system as carried out by ballots is still fairer, for it is the same as this method of voting in the park except in certain respects in which it is better.

The voter casts his ballot by putting the figure 1 opposite his first choice, the figure 2 opposite his second, the figure 3 opposite his third, and so on for as many choices as he cares to express.

After the polls close all the ballots from the entire multi-member district are brought together to a single counting place.

The count is a succession of simple steps which do with the ballots exactly what the voters would do with their votes if they could know how others were voting, as in our election in the park. The figures on the ballots are sufficient directions for the necessary transfers. For a detailed description and illustrative election, see the P. R. League's Leaflet No. 5 (or No. 11, which contains suggestions for conducting demonstration elections).

Majority Rule

If all the members have been elected by only a little more than half the voters—as they may be under either the single-member dis-

[2] The arithmetical rule which will always give the quota sufficient to insure election is to divide the total number of persons who cast valid votes by one more than the number of candidates to be elected and take the smallest whole number larger than the resulting quotient.

trict system or the block vote—a majority of the members may have been elected by only a little more than a quarter of the votes. But if, as under P. R., nearly all the voters are not only nominally but truly represented and in the right proportions, any majority vote of the members is almost sure to represent a majority of the voters.

Accuracy and Continuity

P. R. with the single transferable vote is a delicately adjusted instrument for measuring changes in the popular will. It detects new movements which the crude majority systems would fail to register. But it never exaggerates. Under the usual systems there comes a slight shift, with no record; a second slight shift, and again no record; a third slight shift—and the indicator goes spinning to the proportions of a "landslide." A whole block of untried men are unexpectedly swept into office and tried public servants are as unexpectedly swept out. P. R. with the single transferable vote records each shift in just its right proportions.

A Check to Machine Rule

Although many important minorities are deprived of all representation by the usual election systems, there are other minorities which get altogether too much. Those who make a business of politics can often secure the election of members out of all proportion to the numbers of their supporters.

P. R. with the single transferable vote is just as effective in keeping such minorities from getting more than their share as it is in keeping others from getting less. This was well illustrated by the first P. R. election of the city council of Sacramento, California, held on May 3, 1921. We quote from the Sacramento *Union* of that day: "A well known boss in this city, long ruler of the most powerful part of that invisible ruling force engaged in politics for purposes seldom in accord with the public welfare, has paid the most flattering compliment to proportional representation that it could possibly receive from anyone. This expert in the manipulation of elections excused his apathy in the present campaign by declaring that it would cost from fifteen to twenty thousand dollars to beat the proportional representation system at the coming election and that even with this great expenditure no guarantee of success could be given. In previous elections this boss has turned the scales by controlling a block of less than a thousand votes."

The voters under the influence of the "boss" referred to elected only two members out of nine. Having helped to make up the

quotas of two members, their ballots were exhausted. They were powerless to influence the choice of the other seven, even though the opposition was divided and in large measure unorganized.

Freedom to Nominate

The influence of any election system is sure to be felt even before the voting itself takes place—in the making of nominations. Under a majority system you probably do not nominate your favorite unless you think he may beat every opponent: to do so might throw the election to the person you want least of all. Under P. R. with the single transferable vote you can safely nominate him even if he may not get a single vote beside your own.

The Transformation of Machines

The power of machines depends in large measure on their power to control nominations. P. R. removes that power and gives it to the voters themselves. When party voters are given a free choice within the party, "machine" rule in the old sense no longer exists. The machine may continue to "rule," but only with discretion and subject to overthrow at any time if it affronts the party voters.

The Development of Leadership

The new situation, moreover, makes the position of legislator more attractive to men and women of outstanding ability and independent character, the people best qualified to legislate.

Under P. R. with the single transferable vote a leader of outstanding qualifications can secure election as a minority member without waiting to build up a huge organization or to win over a majority of the electors. He can also retain his place year after year, however the tides of public sentiment may ebb and flow, so long as he continues to hold the confidence of any considerable part of the voters. Only the less capable members come and go. The great leaders of all viewpoints can count on unbroken careers. An Asquith, a Venizelos, a General Smuts[4] can hardly be defeated.

[4] These statesmen have been defeated recently under majority systems of election.

Beard, (4th Ed.), pp. 525–557.
Mathews, pp. 73–109.
Kimball, *State and Municipal Government,* pp. 39–60.
Ogg and Ray, (2nd Ed.), pp. 552–566.
Dodd, *State Government,* pp. 454–475; 476–501.

XIX

LEGISLATIVE ORGANIZATION AND REPRESENTATION

The organization of the forty-eight state legislatures has been subjected to severe criticism. Questions have been raised as to the effectiveness of the bicameral system, and many proposals have been made for the adoption of the unicameral system. The differences which may have existed between the two legislative branches have largely disappeared, except as tradition has continued dissimilarities in terms of office, salaries, membership, etc. Arguments as to the efficacy of the check of one House over the other have been punctured by studies which show that this check is not operative. The bases for the retention of bicameralism are tradition, which is a powerful factor, and the desire to have area representation in the one branch and popular representation in the other. A balance of power is secured between urban and rural districts, and the bicameral system has allowed "corn-stalk legislation," government by yokels," and the like. It has protected the rights of rural minorities, but in many cases it has failed to protect the rights of urban minorities. Some more logical plan might be adopted to protect these minority groups, and one of the proposals made aims at some form of proportional representation. Rural areas have failed to recognize city problems, and in some cases economic interests in the cities have used the rural voter to protect them. Two changes are advisable in state legislatures: first, the adoption of the unicameral system, with the reduction of the number of members to a reasonable figure; second, the adoption of some form of proportional representation to protect minority groups and to insure a representative government.

74. LEGISLATIVE ORGANIZATION AND REPRESENTATION[1]

By James W. Garner

THE LEGISLATIVE ORGAN

The constitutions of all the states declare that the powers of government shall be distributed among three departments—the legisla-

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tive, the executive, and the judicial, "to the end," say the constitutions of Alabama and Massachusetts, "that the government may be one of laws and not of men." In most of them it is declared that no person or collection of persons exercising the functions of one department shall assume or discharge the functions of any other, and that of New Hampshire adds: "the three departments ought to be kept as separate from and independent of one another as the nature of free government will admit." In all the states the legislative organ is a bicameral assembly, although the constitution of a number of states reserves to the people in their primary capacity the power of legislation through the agency of the initiative and the referendum.[2]

In about half the states the legislative organ is officially designated as the "legislature"; in some it is styled the "general assembly"; in three (Montana, North Dakota and Oregon) it is designated as the "legislative assembly" and in two (Massachusetts and New Hampshire) as the "general court." In all the states the so-called "upper house" is styled the "senate"; in three (Maryland, West Virginia and Virginia) the "lower house is styled the "house of delegates"; in four (California, Nevada, New York and Wisconsin) the "assembly"; in one (New Jersey) the "general assembly"; and in the rest, the "house of representatives."

THE BICAMERAL SYSTEM

As has been said, all the legislative assemblies at present consist of two chambers or houses having substantially equal powers of legislation, except that in about twenty states the initiation of revenue bills belongs exclusively to the lower house. In nearly all, the constitution declares that the lower house shall have the exclusive power of impeachments, and in all but two, the senate has the power to try impeachment cases. In about one-third of the states the senate has a share in the appointing power, its consent being necessary to the validity of all appointments made by the governor. These are the principal differences between the two houses, so far as their powers are concerned.

With the exception of three rather short-lived experiments[3] the

[2] Discussed in another paper in this series.

[3] The Legislatures of Pennsylvania, under the constitution of 1786, of Georgia, under the constitution of 1777, and of Vermont under the constitution of 1786, were unicameral in structure. In each of these states, however, there was an executive council which had a limited share in legislation, but it was too restricted to warrant its being considered as a legislative chamber. In 1789 Georgia adopted the full bicameral system; Pennsylvania did likewise in 1790 and Vermont in 1836.

single chambered state legislature has never been tried out in the United States. Like the theory of the separation of powers, the principle of the bicameral system has been regarded since the Revolution as an axiom of American political science, the *quod semper,* the *quod ubique,* the *quod ab omnibus,* says Bryce, of American Constitutional doctrine.[4] It is a part of the general system of checks and balances which constitutes one of the distinguishing characteristics of both the national and state government and there have not been lacking respectable authorities who regard it as a necessary feature of representative government. The bicameral system, like the Common law, said Francis Lieber, accompanies the Anglican race and everywhere it succeeds.[5] This has been the opinion of the great majority of political writers and publicists, including John Adams, Hamilton, Kent, Story, Curtis, Bryce, and others.

The advantages claimed for the bicameral system may be grouped under three heads. In the first place, where there are two houses one serves as a check upon the haste, carelessness and errors of the other. The smaller and more conservative body tempers the impetuousness and restrains the radicalism of the other; "the need for two Chambers" says Bryce, "is based on the belief that the innate tendency of an assembly to become hasty, tyrannical and corrupt needs to be checked by the co-existence of another house of equal authority. The Americans therefore restrain their legislatures by dividing them just as the Romans restrained their executives by substituting two consuls for one King."[6] A hastily prepared measure is not so likely to be enacted into law where it may be arrested in its course and subjected to the scrutiny and revision of another body of men who may be better qualified to judge of its merits than those who initiated and passed it in the first instance.[7]

[4] *The American Commonwealth,* edition of 1910, Vol. I, p. 485.

[5] *Civil Liberty of Self Government,* p. 197.

[6] *The American Commonwealth,* Vol. I, pp. 484.

[7] Thus Argues Kent, *Commentaries on American Law,* Vol. I, Sect. XI. To the same effect see Lecky, *Democracy and Liberty,* Vol. I p. 300 and Story, *Commentaries,* Vol. I, sec. 550, et seq. Martin Van Buren in the New York Constitutional Convention of 1821 (*Debates* p. 70) thus stated the argument in favor of the bicameral system: "With regard to the first of those objects—the prevention of hasty and improvident legislation—the system of every free government proceeds on the assumption that checks, for that purpose, are wise, salutary, and proper. Hence the division of all legislative bodies into district branches, each with an absolute negative upon the other. The talents, wisdom, and patriotism of the representatives could be thrown into one branch, and the public money saved by this procedure; still experience demonstrates that such a plan tends alike to the destruction of public liberty and private rights. They adopted it in Pennsylvania, and it is said to

Professor Burgess, speaking of the difficult function of interpreting the common consciousness, remarks that the legislature must be so constructed as to best facilitate this object and this requires the existence of a second chamber. "A single body of men," he says, "is always in danger of adopting hasty and one-sided views, of accepting facts upon insufficient tests, of being satisfied with incomplete generalizations and of mistaking happy phrases for sound principles. Two legislative bodies do not always escape these crude and one-sided processes and results, but they are far less likely to do so than is a single body. There is a sort of healthy and natural rivalry between the two bodies, which causes each to subject the measures proceeding from the other to a careful scrutiny and destructive criticism even though the same party may be in a majority in both. In this conflict of views between the two houses lies in fact the only safeguard against hasty and ill-digested legislation when the same party is in a majority in both houses." Again, he says "The necessity of a double, independent deliberation is thus the fundamental principle of the bicameral system in the construction of the legislature. A legislature of one chamber inclines too much to radicalism. One of three chambers or more would incline too much to conservatism. The true mean between conservatism and progress, and therefore the true interpretation of the common consciousness at each particular moment will be best secured by the legislature of two chambers." [8] In the second place, the bicameral system, it is argued, furnishes a means of protection to the people against the despotic tendencies of legislative bodies. Thus it not only conduces to the enactment of carefully considered legislation, but is a guarantee of liberty and a safeguard against legislative tyranny. The natural propensity of legislative assemblies to usurp the powers of the executive and political departments, to overstep their constitutional boundaries and to become omnipotent, was touched upon by Hamilton, Judge Story, and other early commentators. The only effective barrier against this danger, said Story, "is to separate the operations of the legislature, to

have received the approbation of the illustrious Franklin; but they found that one branch only led to pernicious effects. The system endured but for a season; and the necessity of different branches of the government, to act as mutual checks upon each other, was perceived, and the conviction was followed by an alteration in their Constitution. The first step, then, toward checking the wild career of legislation, is the organization of two branches of the legislature. Composed of different materials, they mutually watched over the proceedings of each other. And having the benefit of separate discussions, their measures receive a more thorough examination, which uniformly leads to more favorable results."

[8] *Political Science and Constitutional Law,* Vol. II, p. 107.

balance interest against interest, ambition against ambition, the combinations and spirit of dominion of one body against the like combinations and spirit of another." "It is far less easy," he said, "to deceive or persuade two bodies into a course subversive of the general good than it is to persuade or deceive one." [9] The bicameral system, said Hamilton, "doubles the security of the people by requiring the concurrence of two distinct bodies in any scheme of usurpation or perfidy where otherwise the ambition of a single body would be sufficient." [10] Burgess, speaking along this line, contends that the bicameral system by preventing legislative usurpation in the beginning avoids executive usurpation in the end. Two chambers are necessary, he says, to preserve the balance of power between the legislative and executive departments. "The single chamber legislature tends to subject the executive to its will. It then introduces into the administration a confusion which degenerates into anarchy. The necessity of the state then produces the military executive, who subjects the legislature to himself. History so often presents these events in this sequence, that we cannot refrain from connecting them as cause and effect." [11]

Finally, it may be argued that the bicameral system affords a convenient means of providing representation for the diverse and sometimes conflicting social and economic interests within the state. As is well known, it was this consideration which originally gave rise to the establishment of legislative bodies composed of two or more chambers. It is true that the various orders or estates into which society was divided when the representative system first appeared have largely disappeared and with them the original reason for the establishment of the bicameral system, but other diverse and at times conflicting interests have arisen which according to some authorities should have special representation. Chief Justice Spencer speaking in the New York Constitutional Convention of 1821 asserted that the function of an upper chamber was not merely to provide a check on hasty and ill-considered legislation, but to furnish protection to the interests of the land-holding and other property owning classes.[12]

[9] *Commentaries,* sec. 558.

[10] *The Federalist,* Ford's edition, p. 412.

[11] *Op. cit.* Vol. II, p. 107.

[12] *Debates,* pp. 216–217.

"Those who suppose that a second branch of the legislature, the senate, was intended merely as a check upon the first, appear to me to have misunderstood its origin and design. It was intended to be differently composed and differently organized for other purposes than a mere second branch of legislation. The objects of government are the protection of life, liberty and prop-

With the present notions of democracy, this argument no longer has much if any force. Unless therefore we should return to the earlier ideas of representation, the principal defense of the bicameral system must rest upon its effectiveness as an agency for preventing undesirable legislation rather than an organization for the protection of the interests of special classes.

Such are the principal arguments in favor of the bicameral system. From the very first, however, there have been publicists and political writers who refused to admit the advantages generally claimed for it. Among the earliest of these opponents were William Penn and Benjamin Franklin. Franklin is said to have compared a double chambered legislature to a cart with a horse hitched to each end both pulling in opposite directions. In France, the bicameral theory had powerful opponents in Turgot, Sieyès, Condorcet, Robespierre, Lamartine and other well known publicists.[13] *"The law,"* said Sieyès, *"is the will of the people; the people cannot at the same time have two different wills on the same subject—where there are two chambers, discord and division are inevitable and the will of the people will be paralyzed by inaction."* [14] *"If a second chamber dissents from the first,"* he said, *"this is mischievous; if it agrees with it, it is superfluous."* Since Franklin's day, however, until very recently, the bicameral idea has been accepted by Americans as an indispensable feature of the check and balance system, and few persons questioned its utility. Apparently, however, there is at present an increasing skepticism regarding the advantages of a second house and recently the claims made in its behalf have been challenged in various quarters. In several instances, attempts have recently been made to study the actual workings of the system in certain states and to arrive at definite conclusions regarding the results. In every such case, so far as I am aware, the conclusions of the investigators have failed to justify the claims made in favor of the bicameral system. Mr. Lynn Haines in a study entitled "The Minnesota Legislature of 1911" [15] after a careful examination of the proceedings of the legislature of

erty. These are important and paramount rights; and every wise framer of government will extend its protecting care over all and each of them. The assembly, consisting of greater numbers, elected by all the sound and wholesome part of the adult male population of the State, is more emphatically charged with the protection and preservation of the personal rights, the lives and liberties of the citizens. The senate was intended as the guardians of our property generally, and especially of the landed interest, the yeomanry of the State."

[13] See my *Introduction to Political Science*, pp. 428–430.

[14] Quoted by Lobonlage in *Questions Constitutionnelles*, p. 349.

[15] Minneapolis, 1911.

Minnesota at its session of 1911 reaches the following conclusions:

"Either the Senate or the House might well be abolished. In all my observations, extending through several sessions, I have never seen the least excuse or need for the two bodies. On the other hand, the existence of an upper and lower branch makes possible the 'team work' which has been used so often and so effectively against the people. I would do away with the Senate. There is already too much 'check' on the chief executive and the courts."

In a book entitled "The Story of the California Legislature of 1913" Mr. Franklin Hickbern presents the results of an even more elaborate study and he points out that there was a strong sentiment among the members of the legislature in favor of abolishing the senate. This feeling first showed itself in a proposed amendment to the rules, the effect of which would have been to eliminate the check and balance function of the upper house by "putting the Committee organization on what was practically a one-house basis." The proposed rules provided for the appointment of thirty-four Committees composed of both senators and representatives to do the Committee work of both houses. The chief consideration in favor of the proposed change, says Mr. Hickbern, and one which probably did not occur to the author of the proposal, "was that a two-house legislature has proved unwieldy and ineffective and anything which promises relief is worthy of attention." [16] Later in the session an amendment was proposed to the constitution providing for a legislature of one house (to be composed of forty members).[17] In the assembly thirty-seven members voted for it and thirty against it. In the senate the vote for it was nineteen as against fifteen. Thus fifty-six members in a legislature composed of 120 members went on record as forming a single chambered legislature.[18] It was evident from this vote that in one state, at least, the sanctity of the bicameral idea is losing its force.

A third study dealing with the workings of the bicameral system has been made by Dr. David L. Colvin, the result of which has been published in a monograph entitled "The Bicameral Principle in the New York Legislature." [19] His investigation includes a careful analysis of the work of the legislature at its session of 1910. At this session, he says, 1,036 bills were passed by the senate, and of those only sixty-nine were rejected by the assembly; of 1,128 bills passed

[16] p. 46.

[17] This reform has recently been recommended by the commonwealth club of San Francisco. See its *Transactions* for 1914.

[18] p. 366.

[19] New York, 1915.

by the assembly, only 161 were defeated in the senate. In other words, the assembly killed six per cent of the senate's bills and the senate killed fourteen per cent of the assembly's bills.[20] Notwithstanding the double check of each house upon the other, the total number of bills thus defeated did not equal the number disapproved by the mayors of cities to which they were required to be submitted and vetoed by the governor of the state—240 in all. The check of the second house does not seem very effective, says Mr. Colvin, when about one-fourth of the measures passed by the legislature were of such a character as to require the check of the executive veto. Of the 967 bills passed by the legislature, 505 passed both houses without change. The fact that fifty-eight of them were recalled and 102 others were vetoed indicates that the second house failed to fulfill one of the chief functions for which it was created. A goodly number of the senate bills defeated in the house were minor amendments of little importance, while many of the assembly bills which were rejected by the senate were local or special bills, from which it follows that the checking function, small as it was in quantity, was still less in importance. Mr. Colvin's conclusion is that while a few questionable measures passed by one house were rejected by the other, many others more questionable passed both houses only to be stopped by the executive veto which proved to be the more effective check. It can scarcely be claimed therefore that the bicameral system provides an effective check on hasty, ill-considered and careless legislation.[21]

An examination of the legislation of Illinois covering the four sessions of 1907, 1909, 1911, and 1913 reveals a somewhat better showing in favor of the bicameral system than does that of New York for the year 1910 although it is hardly conclusive. At the session of 1907 the senate failed to pass 29 per cent of the house bills; at the session of 1911, it rejected 19 per cent of the house bills and at the session of 1913 it rejected only 5 per cent of the house bills. The average for the four sessions was 19 per cent. The bills vetoed by the governor for this period was 10¾ per cent of the total number passed by both houses.

Originally the bicameral system was more defensible than now. The senate was much more a body representing different interests from those represented by the house and it was differently constituted. Higher qualifications were usually required for membership in it; senators were elected for a longer term than representatives and they were often elected by a more restricted suffrage. Today on the same basis, in many states, senators and representatives are chosen

[20] p. 81.
[21] p. 180.

by the same constituency and for the same term, the same or substantially the same, qualifications are required for membership in both houses and both houses represent members instead of particular classes, interests or political units. Each chamber is in short a mere duplication of the other, neither is more conservative or radical than the other, and each is subject to the same influences. Thus it has come to pass that the state employs two substantially identical organs to perform the same functions. The employment of two supreme courts, one with power to veto the decisions of the other, would hardly be less logical; obviously under such circumstances the value of a second chamber as an organ of revision and an agency for restraining the radicalism of the other chamber cannot be very great. To realize fully the purposes for which the bicameral system was devised the two chambers must be constituted on different principles. As Francis Lieber has well observed if the two houses are elected for the same term and by the same electors they amount in practice to little more than two committees of the same assembly; if there are two chambers they should represent different elements; progress and conservation, innovation and adhesion, etc.[22] Some writers even go to the length of maintaining that the bicameral system subserves no useful function at all when each house is merely a duplicate of the other.[23] Chief Justice Spencer, speaking in the New York Constitutional Convention of 1821 said on this point:

"However subdivided the legislature may be in its several branches, if it be composed of persons exactly similar in qualifications, it will be virtually one and the same body. Put one body in an upper house, the other in a lower house; call one lords, and the other commons, it avails nothing; they are but one body, possessing the same feelings, the same sympathies, and the same objects."

It was not enough, he added, to give the senate a smaller size and a longer tenure; to justify its existence it must represent a different constituency and in other respects be constituted on different principles from those of the other house.[24]

One of the staunch arguments in support of the bicameral legislature is that the existence of a second chamber increases the difficulty of getting measures through the legislature by means of corrupt methods since it is less easy to bribe or otherwise improperly influence two chambers than one.[25] This may be admitted, but those who rely upon this argument overlook the fact that the rule works

[22] *Civil Liberty and Self Government*, p. 198.
[23] For the contrary view, however, see Burgess, *op. cit.* Vol. II, p. 108.
[24] *Debates*, pp. 217–218.
[25] Compare Bryce, *op. cit.* Vol. I, p. 557.

both ways, since the check thus provided may be the means of preventing the enactment of good measures as well as bad ones, and in practice, this is often the case.[26] The notion sometimes held that the larger the number of members composing the legislature the more difficult it will be to pass a measure through corrupt methods may be seriously questioned. On the contrary, where the legislature is a small single chambered assembly, each member's responsibility can be more definitely fixed, the light of publicity beats more clearly upon his acts by reason of his greater conspicuousness and the less easy it is for him to be reached by improper influences and to escape responsibility. In a recent book entitled "Second Chambers in Practice" (Ludin 1911) prepared by a group of English publicists including several members of parliament, a secondary analysis has been made of the utility of bicameral legislatures and in the main the conclusions of the authors are against the system as appears from the following summaries: "Where there is a federation, utility of the upper chamber is obvious, but in a unitary state it is the reverse of useful, and many Colonial states are finding this out. Judging by Colonial experience, the upper house is of little use as a safeguard, since it tends to become a reflex of the lower house; the bicameral superstition is gradually dying." [27] Again: "Second chambers are in practice constant sources of friction where they are not mere instruments of delay and delay can be better provided for by other expedients." [28]

In several states recently proposals for the establishment of a single chamber legislature have been made and they have aroused widespread discussions. In the Ohio Constitutional Convention of 1912 one of the delegates, Mr. Elsom, made such a proposal and in advocating its adoption he said in criticism of the bicameral system,[29] "Why did England and her colonies have the bicameral system? Because, first, society was of different classes, and each chamber represented a class; and, second, because it was at first believed that one branch would prove a check and balance on the other. Seldom has this proved true in practice. Far more frequently has one chamber hid behind the other, shifted the responsibility for a bad act to

[26] This is the testimony of Mr. G. S. Gilkerson, reading Clerk of the Oklahoma state Senate for five successive sessions. He says he has reached this conclusion after "a careful watching of the working of the Oklahoma legislature" since the admission of the state to the union. *Unicameral Legislatures,* University of Oklahoma Bulletin, New Series No. 77, p. 50.

[27] p. 57.

[28] p. 85.

[29] See his article in the *Review of Reviews,* Vol. XLV, p. 340.

the other. Hundreds of times has an unwieldy two-chambered legislature passed acts that could never have passed had it been composed of a few trained, mature men, conscious that they were acting in the limelight of the public eye." In 1913, the governor of Arizona in his message to the legislature recommended an amendment to the Constitution providing for the establishment of a one-house legislature [30] and in the same year, Governor Hodges of Kansas made a similar recommendation to the legislature of that state. He declared that he was satisfied after eight years' service in the state senate that the system of legislation by a two-house assembly was antiquated and inefficient and that the original reasons which led to the establishment of the bicameral system have long since disappeared. The specific proposal of the governor was that a legislative assembly of not more than sixteen members be substituted in the place of the existing two-house assembly of 165 members, one-half of whom might be elected from districts and the other half from the state at large upon a non-partisan ballot and for a term of four years.[31] In Nebraska, Oregon, Oklahoma, California, Kentucky, and other states, there has recently been cosiderable agitation in favor of abolishing the bicameral system. In Nebraska a joint Committee of the legislature has lately made a report recommending that in 1916 a constitutional amendment be submitted by initiative petition providing for a legislature consisting of a single house.[32] "We believe," says the Committee, "that for Nebraska in its present state of social and industrial development such a legislature may be secured by the election of one body having a membership somewhere between that of the present Nebraska senate and the present house." Among the arguments which it advances in favor of a single chamber legislature are the following:

1. Representative government by the people should be direct and responsible. One body can more directly represent the public will of a democratic people than two or more.

2. Cities all over the civilized world having a larger population and more diverse interests than Nebraska are governed by one body, and the tendency is to make that body smaller with more direct responsibility upon each member than hitherto.

[30] See his address before the Governors' Conference at Colorado Springs in 1913, *Proceedings*, p. 246.

[31] See his address entitled *Distrust of State Legislatures, the Cause and the Remedy*, before the Governors' Conference at Colorado Springs in 1913. *Proceedings*, pp. 248 *et seq.*

[32] This report is printed as a bulletin (No. 4) of the Nebraska Legislature Reference Bureau, May 15, 1914.

3. The need of representation for different orders or classes of citizens in respect to wealth, education, or social position no longer exists.

The spirit of American institutions is to abolish class distinctions in government and to diffuse education and wealth, letting social position take care of itself.

4. In practice it has been found that the so-called "check" between the two houses results in trades and absence of the real responsibility which should be felt by representatives of the people. Nothing is more common than for one house to pass a bill and the members who voted for it to urge the other house to defeat it, or for a little group of members in one house to hold up legislation from the other house until they extort from it what they demand.

5. Deliberation and reflection do not now mark the work of a two-house legislature, which passes most of its acts in the last ten days of the session. A smaller body with a more direct responsibility upon each member arising therefrom will tend to greater deliberation and reflection than the present system.

A proposal for abolishing the state senate of Oregon was submitted to the voters of that state in 1912 and again in 1914, and although defeated, it received a very respectable vote.[33]

A committee of the Peoples' Power League submitted an argument in favor of the proposed amendment in which it declared that the senate of Oregon prevented the enactment of desirable measures more often than bad ones, that the executive vetoes, the referendum and the Supreme Court provided ample checks against unwise and unconstitutional legislation, that the bicameral system doubled the opportunity and temptation for trading and log-rolling, fraud, failure, extravagant appropriations and general inefficiency and at the same time largely destroyed responsibility. The present system, also, it said, greatly increased the expense for clerk hire and other expenses. In 1907 the legislature of Oregon, it declared, spent almost ten times as much for clerk hire alone as the one-house legislature of British Columbia did in 1908.

It is also worth remarking that there are already more than 60 legislatures in the world today organized on the single chamber principle, so that the American proposals are not innovations by any means. In Germany there are sixteen such legislative assemblies, eight of the ten Canadian provincial assemblies are unicameral bodies, so are the Swiss Constitutional legislatures, most of the provincial districts of Austria and Hungary and the national legislatures of Norway, Bulgaria, Montenegro, Servia and various Central American

[33] In 1914 the vote for the proposal was 62,376 as against 123,429.

Republics.[34] When the South African union was organized in 1909, not only were the upper houses of all the local legislative assemblies abolished, but the constitution gives the senate of the union no protection after ten years and there was a strong party in the Convention which favored abolishing it outright. In this connection, it may also be remarked that Dr. F. J. Goodnow in his memorandum recently submitted to the President of the Republic of China recommends a single chamber parliament for that vast Empire. He apparently attached little weight to the utility of a second chamber as a checking and revising body and since the country has no landholding or other aristocracy and no states or provinces to which it is necessary to give special representation, the country has no need of a legislature consisting of two chambers.[35] Finally, it may be remarked that the legislative organs of most of the great cities of America and Europe are unicameral in structure. Among them may be mentioned New York, Chicago, Boston, Cleveland, and San Francisco, each of which contains a larger population than some of the states.

75. MUNICIPAL REPRESENTATION IN STATE LEGISLATURES[1]

By J. M. Mathews

In the American states there are two main principles upon which representation is based: the first is the people *en masse*, and the second is the people by governmental subdivisions. Various combinations of these two main methods of representation are also found. The first principle of representation is adopted in the election of the state executive officers, such as governor, lieutenant-governor, secretary of state, *et cetera*. This principle is also applied in the election of the presidential electoral college, United States senators, and members of the lower house of congress in states having but one member and occasionally in other states where the legislature has failed to provide as many congressional districts as the number of members to which the state is entitled. It is also applied in the operation of

[34] See the list in Bulletin No. 4 of the Nebraska Legislative Reference Bureau, 1914, p. 37; also Temperley, *Senates and Upper Chambers*, p. 9; Marreott, *Second Chambers* (Oxford 1910) and Harley and others, *Second Chambers in Practice* (London, 1911).

[35] See the full text of this memorandum as printed in the *American Political Science Review* for November, 1911, pp. 541–563.

[1] Reprinted from the *National Municipal Review*, March, 1923, by permission of the editor.

the state-wide referendum on constitutions, constitutional amendments and ordinary legislation. In all of these cases a vote cast anywhere in the state counts just as much as a vote cast anywhere else in the state. There is no over- or under-representation of one part or section of the state as compared with another. If the members of the state legislature were elected in a state-wide election on a general ticket, there would arise no difficulties connected with the division of the state into representative districts and there would be no possibility of a gerrymander. A combination of the general ticket plan with district representation might be worked out that would probably give greater satisfaction than the present plan, especially if the bicameral system were abolished and a one-house legislature introduced. The complete adoption of the general ticket plan of electing the legislature, however, is hardly practicable because it would make the ballot too long and would leave no room for minority representation. In all the states, therefore, we find that the legislatures are elected on the plan of district representation. These districts are either especially created for this purpose or are already used for local government purposes, or, more generally, a combination of these two kinds of districts is found.

ROTTEN BOROUGHS IN THE UNITED STATES

The earliest system of representation as established in England adopted the local community as the basis or unit to which representation was accorded without regard to population. It was natural that the same plan should have been adopted in the American colonies. Even until well into the nineteenth century, cities were comparatively small, and consequently, although population was not taken into consideration primarily in fixing representation, as a matter of fact there was no very great or serious divergence from the population basis of representation.

With the shifting of population in the nineteenth century, however, and the growth of manufacturing and industrial cities, many of the rural communities in the south of England came to be what were called "rotten boroughs." The same development also took place in the United States, until by the beginning of the twentieth century, the departure from the principle of popular representation had become very great and serious in some of the states. This was especially true in the case of some of the older states on the Atlantic seaboard, mainly in New England, where the town system of local government influenced the plan of representation. In the New Eng-

land states, with the exception of Massachusetts, the constitutions generally provide that each town shall have at least one representative in the lower house. This general requirement is supplemented in Connecticut by the provision that no town shall have more than two representatives and in Rhode Island by the provision that no town or city shall have more than one-fourth of the total membership of the lower house. This narrowly restricts the representation of such cities as Providence and Hartford. In Rhode Island, the under-representation of the cities is further accentuated by the provision that each town or city shall have only one senator. In other states outside of New England equal representation of counties in the senate is found. Thus, in New Jersey, Maryland and South Carolina each county is entitled to one and only one senator. This provision produces great under-representation in New Jersey in the case of two populous counties, containing large cities. Baltimore is not affected by this provision, since it is not situated in a county, but a special provision limits it to four senators out of a total of twenty-seven, although it has about half the total population of the state. It is also limited to less than one-fourth of the representatives in the lower house. Wilmington, Delaware, is in much the same situation as Baltimore with reference to its representation in both houses. Philadelphia is also limited, though not so seriously as Baltimore, by the provision that no city or county in the state shall have more than one-sixth of the total number of senators. The constitution of New York limits the number of senators which any one county may have to one-third, and the number which any two adjoining counties may have to one-half. New York City, however, is not yet seriously affected by this provision, since it includes five counties and might, therefore, elect more than half the senators.

THE COUNTY EMPHASIZED

In about one-third of the states, the constitutions provide that each county shall have at least one representative in the lower house. This provision practically operates to restrict the representation of the more populous counties and to give undue representation to the sparsely populated counties because of the general policy of definitely fixing in the constitution the exact number of members in each house. In the states having county representation there are usually a number of counties having less than the representative ratio, that is, the quotient arising from dividing the population of the state by the number of members. There are some of these states in which some

counties have even less than half the ratio. The resulting over-representation of such counties can be allowed, of course, only by depriving the more populous counties of some of the representation to which, on the basis of population, they would be entitled.

Even in states which do not have county representation, the counties are not entirely ignored, but it is usually provided that representative districts shall follow county lines and that, in forming such districts, no county shall be divided except when it includes more than one district. Where county lines are thus taken into consideration, it is impracticable to form the districts so that they shall contain exactly equal population. Even if this were done so that, at any given time, each district contained exactly the same number of inhabitants, this condition would quickly change with the shifting of population, so that inequalities would arise. In order to provide for this contingency, the constitutions usually provide that periodic reapportionments shall be made. The usual interval between reapportionments is ten years, and, in most states the figures of the Federal census are adopted as a basis. Where, as happens in some states, no requirement of periodic reapportionment is found, the inequalities are naturally greater. Even in some states where such a requirement is found, the constitutional provision has sometimes been ignored by the legislature, as in Illinois, resulting in a progressively increasing inequality between the different districts.

THE BASIS OF REPRESENTATION

Some states have adopted as a basis of representation not the total population but a restricted portion of the population, or the number of inhabitants remaining after deducting certain classes. Thus, Oregon adopts the white population as a basis; New York and North Carolina exclude aliens in determining the basis; Massachusetts and Tennessee base representation on the number of qualified or legal voters. The last-named provision would operate in most states to exclude aliens. Logically the voting population would seem to be a better basis than the total population. The theory involved in the second section of the fourteenth amendment to the constitution of the United States is apparently that representation should be based on voting population. Such a provision would operate against the large cities as compared with the total-population basis, since, in determining representation, the floating and alien population found in considerable numbers in most large cities would be eliminated. Such an elimination would naturally increase proportionately the representation of the rural districts, but, now that

women have been granted full suffrage, the voting population would seem to be a fairer basis of representation than the total population. If a person is not considered fit to vote for representatives, there would seem to be no good reason why he should be counted in determining the basis of representation.

From this brief review of the provisions regarding representation found in the different states, we may pass to a consideration of the arguments for and against the different methods adopted. The historic New England system of equal representation of towns, without regard to population, however justifiable originally, is quite indefensible from the standpoint of its present operation. It is entirely out of harmony with the modern trend of democratic thought. On the other hand, the democratic theory should not be pushed to the extreme of holding that the lines of local governmental areas should be entirely disregarded and the state divided into equally represented districts containing absolutely equal blocks of population. The objections to such a plan are obvious. It would open a wide opportunity for gerrymandering the state on a larger scale and in a more obnoxious manner than when county lines are regarded. Even under present conditions, a comparison of party votes with party representation in most states shows that the percentage of the representatives in both houses controlled by the majority party is usually much greater than the percentage of its popular vote for governor, while the percentage of representatives controlled by the minority party is usually much less than the percentage of its popular vote. The constitutional requirement that the legislature shall consider county lines in making the apportionment tends to check somewhat the evils of the gerrymander. Mere representative districts formed without regard to county lines, moreover, would be quite artificial, while the counties have to some extent a social and political unity.

It does not follow from the above considerations, however, that each county should have a representative in the legislature, especially in states where there are wide variations in the density of population in different sections of the state. Such representation could not, as a rule, be granted, even in the lower house, consistently with equal representation for all parts of the state, without making that house entirely too large for efficient work. It might be argued that counties should have representation in the state legislature on the analogy of the system of representation in county boards of supervisors and in congress. In the county boards, it is true, each township usually has one representative, without regard to population, and, although populous townships may be allowed more than one, urban districts

are usually under-represented. But the county has aptly been called the "dark continent" of American politics, and it is hardly likely, therefore, that we can derive much light on this question from that source.

It might be argued that each county in the states should have at least one representative in the lower house and support for this position sought from the fact that the constitution of the United States provides that each state shall have at least one representative in the lower house of congress. The analogy, however, is defective. The states, of course, are not federal governments, nor do the counties occupy the same position in the states that the states do in the union. Moreover, the operation of the provision would be different in the two cases. Such a provision in most states would give to a considerable number of counties over-representation, while in the case of the lower house of congress, Nevada and a few other states fall below the ratio of representation, but the amount of over-representation in this case is comparatively small. This result is due to the fact that the size of the house of representatives at Washington is greater than that of the lower house in any state and much greater than in most states. Moreover, there is no constitutional limitation upon its size such as is found in most states with regard to both houses of the legislature.

POPULATION AS A BASIS

When the Federal constitution was drawn up state pride was strong and the confidence of the public men of that time in the political capacity of the people was comparatively low. Much was said about the danger of popular assemblies being swayed by excitement and passion. The framers, therefore, provided for representation of the basis of population in only one house, and not fully on that basis even in that house. Since the constitution was adopted there has been a decrease in the feeling of state pride and a simultaneous growth in the general confidence in the political capacity of the people. Hence, it seems probable that, if the Convention of 1787 were meeting now in our present advanced state of thought upon these matters, it would accord a larger recognition to the principle of population as the basis of representation. On the other hand, it is no doubt true that, if the members of such a convention as that of 1787, whether meeting at that time or now, had reason to believe that any one state would ever have sufficient population to control the house of representatives, they would have introduced restrictions so as to prevent it.

THE CITY'S SIDE

In favor of representation in both houses in the state legislature on substantially a population basis, it may be argued that the legislature should not have the power of levying taxes and passing other laws which the people must obey unless the people have been accorded equal representation in the body which makes the laws. If large cities are not accorded the representation in the legislature to which their population as compared with that of the rural districts would entitle them, many residents of the cities may hold in disrespect a law in the making of which they consider themselves not to have been properly represented. Equal representation upon a population basis may therefore be conducive to a more effective enforcement of the law, since it tends to bring the provisions of the law more in accordance with public opinion, upon which its enforcement ultimately depends. If the code of morals of the cities and the rural districts differ so that no general law will meet the approval of state-wide public opinion, there is no good reason why either side should attempt to cram its code down the throat of the other by general law, but local autonomy in such matters should be allowed.

Again, it may be argued that there is no difference in principle between allowing every voter equal weight in choosing state executive officers and allowing him equal weight in choosing representatives in the state legislature. Through his veto power and his positive influence in legislation, the governor is as important a factor in the work of the legislature as a considerable group of that body. Yet it is not suggested that the cities should have less proportional weight than the rural districts in choosing the governor.

THE COUNTRY'S SIDE

On the other hand, one may sympathize with the feeling of the rural districts that they do not want to be dominated by the city political machine. But there is also a machine in the rural districts which one hears less about because it meets with less opposition. Most new movements and so-called radical ideas which point the way of progress and endanger the hold of the majority political party emanate from the cities, while the rural districts are inclined to be more conservative. If the rural districts are much overrepresented, the need for carrying the elections in those districts becomes greater if the political party is to control the legislature.

The efforts of the party organization may therefore be concentrated upon the rural districts with the consequent greater danger of corruption. On the other hand, it is probably true that in the rural communities where everybody knows everybody else, the voters can usually form a more intelligent estimate of the qualifications of the candidates and the machine may therefore be practically compelled to put up better candidates for the legislature in the rural districts than in the cities.

This is not a question upon which either side can afford to insist to the last ditch upon its extreme claims and refuse to compromise. The definite trend of modern democratic thought requires that the population basis of representation should be conformed to as nearly as practicable consistently with adequate recognition of the locality principle of representation. No county should have separate representation if its population is less than half the representative ratio, but should be combined with others to form a representative district. On the other hand, no one county should be allowed to dominate the legislature of the state in both branches.

A compromise of these opposing interests which readily suggests itself is that the population basis of representation should be adopted in one house and the community principle in the other, so that the urban districts shall control one and the rural districts the other. This solution seems attractive on its face, but objections may be urged to it. Such a device may lead to undue friction between the two houses and possible deadlock upon the legislative matters that vitally affect the interests of either section of the state. Moreover, it may lead to a division of party responsibility for the work of legislation, where one party has a majority in the city and the other in the rural districts.

HOME RULE A WAY OUT

If this form of compromise be rejected as inadvisable and if it be accepted as inevitable that complete adoption of the population principle of representation is impossible where it would lead to domination of the state by one city or county, there remain two principal avenues of escape whereby the city may emancipate itself from rural control. These are the initiative and referendum and constitutional home rule. The former avenue, if adopted, would enable the people of the cities to have proportionate weight according to population in direct legislation, without regard to the degree of their under-representation in the regular legislative body. This is probably one reason why the introduction of the initiative and

referendum is opposed by the rural districts. Without regard to the contest between city and country, however, the initiative and referendum may be objected to on general grounds. The more promising avenue of escape for the cities, therefore, seems to be constitutional home rule of a broad and liberal nature. If the city is not allowed to govern itself through the legislature, then it must be allowed to govern itself directly.

76. PROGRESSIVE HOPES AND ROTTEN BOROUGHS[1]

By Orville A. Welsh

The American politicians' fear of a powerful and growing minority which may soon become a majority is imbedded in the constitutions of most of our sovereign States, in many of which the right of the people to rule themselves is thwarted by legislative apportionments, to which those who consider themselves the proper custodians of the "people's interest" stubbornly cling. This conclusion is unavoidable from a study of American rotten boroughs.

It also is evident what a difficult task faces the upbuilders of a third party. In virtually all the big States the cards are stacked against them. All the defects of a rigid federal Constitution are repeated and magnified in the governmental instruments of these commonwealths. Likewise it is clear that when United States senators were chosen by such unrepresentative legislatures the will of the majority of the voters of these States had a long and tortuous sluice to trickle through.

In the "nationally Republican" States of the North, the Democratic as the minority party gets short shrift in legislative apportionment. Aside from gerrymanders, the cities, Democratic in the main or radical, are rankly discriminated against, so that a vote from the conservative rural community is worth several times that of the townsman. The same condition exists in the South, as against any possible minority party. In the West also the political machinery of several States has been manipulated to produce some of the worst phases of the rotten-borough system.

Notable exceptions are Massachusetts and Wisconsin. Representation in both houses of the Massachusetts Legislature is on a population basis of "legal voters," meaning those duly qualified and regis-

[1] Reprinted from the *Nation*, January 7, 1925, by permission of the publisher.

tered. This is the only State in which legal voters are so recognized. In Wisconsin, where Senator La Follette has dominated politics for years, the Socialists, with thirteen members against one Democrat, have formed the opposition party in the legislature. Other States without material rotten boroughs, or where town and country interests are almost identical, are Minnesota, North and South Dakota, and Oklahoma.

The worst examples are Rhode Island in the East, Georgia in the South, and Washington in the far West. The case of Georgia would be more noticeable were there a minority party representing working men in the cities. Nevertheless, it is possible for a Presidential primary candidate to win a majority of the popular vote and yet lose the State's delegation. That happened in 1920.

The reactionary Republicans, representing the interests of the mill-owners, block progressive legislation in Rhode Island through their control of the Senate, cemented by a "progressively" rotten-borough system. Representation being by towns, ranging from virtually non-existent communities (but Republican) to Providence (Democratic), it has been easy to prevent any unexpected turnover and a reform in the whole scheme of things by splitting up into two towns and senatorial districts any city that showed a tendency away from the G. O. P. So there has been the spectacle the past summer (1924) of the Republican senators—facing a progressive Assembly and Governor, as well as an ably led Senate minority, determined to filibuster until a constitutional convention to rectify the State's political abuses was achieved—fleeing ignominiously from the State after an attempt to end the filibuster by gassing Lieutenant Governor Felix A. Toupin had failed. And the G. O. P. machine in Rhode Island was just as indignant at the effort to pass a forty-eight-hour law for women and children in the mills as it was at the broader attack on its own maintenance in power under the 1842 constitution.

Georgia legislative representation is based on first-, second-, and third-class counties with one, two, and three votes inversely in the House. Thus Fulton, with a population of 232,606, has three representatives, against one each for a number of counties under 6,000 population. This inequality extends to the Democratic primaries, except that the vote is doubled. Eight counties with a gross population of 635,326 have only three times the representation of eight counties with 57,617 souls. There are 160 counties in Georgia, mostly of the third class. The rule of third-class units is exemplified in the division among the counties of a third of the three-cent gasoline tax. The split is according to post-road mileage. So Fulton County pays $800,000 of this tax and gets back $14,000,

which it can spend as it likes; while Wayne County pays in $6,000 and receives $24,000.

The State of Washington is ruled by a "cow-county combine," engineered in 1911 by E. A. Sims and L. D. McArdle from Jefferson, the smallest county, to prevent any reapportionment which would cost any county a loss of representation. As a consequence there has been no reapportionment in twenty years, and the constitutional provision for a State census in between the federal enumerations has likewise been disregarded. The controlling counties contain less than a third of the population. How unrepresentative is the legislature is shown by the fact that of the fifteen times since 1912 that legislative acts have been submitted to the voters, only twice has the legislature been upheld—in the case of the bone-dry law and of the recently submitted municipal water-power bill. Incidentally, this is only one of many States where the initiative and referendum, once regarded as "socialistic" and still so termed in some quarters, are the only resource of the whole people against a thoroughly unrepresentative governing body. Roughly speaking the "cow counties" of Washington have from three to ten times the voting strength of the cities so far as State legislation is concerned. The Forty-second District in uptown Seattle cast more than 35,000 votes in 1920, as compared with 1,977 in Jefferson County. Yet each of these units has two representatives. Municipal water-power development has been blocked by rotten-borough legislators, and the Bone free-power bill, allowing city lighting plants to supply consumers outside their borders, was beaten in the last legislature and also by referendum at the election last fall.

Rhode Island, Georgia, and Washington, then, are the Class A rotten-borough States. In Class B, only a shade less extreme, are Connecticut, New Jersey, Delaware, and Maryland. Class C, States in which the urban majority population is outvoted by rural counties overrepresented, includes New York, Ohio, Michigan, and Illinois. Class D, States in which some measure of rotten-borough conditions exist, has Vermont, New Hampshire, Pennsylvania, Missouri, Montana, Arizona, New Mexico, North Carolina, and West Virginia.

Of the Class B States, Delaware and Maryland each has a city with approximately half the total population. Yet Wilmington has but 13.5 per cent and Baltimore 28.57 per cent representation in the State Assembly. The unrepresentative legislatures of both these wet States ratified the Eighteenth Amendment, although Maryland has never adopted an enforcement act. But in Delaware physicians cannot even prescribe liquor on prescription. Vigorous efforts have been made recently by both cities to increase their legislative membership, but

without avail. Home rule has been denied to Wilmington, and it is forbidden to practice daylight saving.

Tampering with clocks also is barred in Connecticut, where each town has just two representatives in the Assembly. One such town is Union, with 257 persons, which has an equal voice in the lower house with Hartford, New Haven, and Bridgeport. It is interesting to recall that the present United States Senator George S. McLean was elected governor in 1902 on a platform calling for a constitutional convention to end these inequalities. Some changes were made in senatorial districts, but that was all. Important educational measures in Connecticut have been killed by the small-town appropriations committee of the House.

Each of the twenty-one counties in New Jersey has one Senator and one only. Essex and Hudson counties contain 40 per cent (1,281,243) of the State's population and have less than 10 per cent representation in the upper chamber. They are paired off with Cape May County, population 19,460, and Sussex, 24,905. Most of the rural senators are Republican. The rural tail wags the urban dog.

Of the Class C States, only in New York is the system frankly partisan. The constitutional provision giving each county at least one member of the Assembly (with the exception of Hamilton) is intended to perpetuate Republican control of the lower branch of the legislature. It does. It is virtually impossible for the Democrats to capture the Assembly, no matter how large and overwhelming the majority for governor and other State officers. Hence the slaughter of Governor Alfred E. Smith's progressive program by Speaker H. Edmund Machold. Even when Democratic supremacy in the Assembly does occur, in a hotly contested general election, it doesn't last long, as assemblymen are chosen every year.

In Ohio, where every county has at least one member of the House, the cities have suffered severely from lack of tax classification and are chronically broke, but the bi-partisan rural bloc will not permit them any relief. In Michigan a "moiety clause" in the constitution permits rural minority control of the House, and the constitutional mandate for a reapportionment of both Senate and House districts every ten years has been disregarded since 1903. The "moiety clause" provides that when any county has a moiety or more than half the ratio of population for one State representative it shall be given the member. There are now thirty-one of these moiety districts out of a total of 100, a constitutional limit.

Wayne County (Detroit) with about a third of the State's population has five of the thirty-two senators and fourteen of 100 members of the House. Here again tax equalization is the principal problem,

with the rural communities and small towns siding against the big cities. More and more, therefore, the inevitable recourse is to the initiative and referendum, where popular votes do count.

In Illinois, Cook County, with more than half the population, has only nineteen of the fifty-one senators, and fifty-seven of the 154 representatives at Springfield. Chicago's utilities are governed by the State, and the city is held to an absurdly low bonded debt. Ratification of the Eighteenth Amendment by a legislature unrepresentative of the whole population was followed by a two to one victory for a beer bill at a referendum two years ago. Also in Missouri (Class D), always a wet State, the amendment was ratified by a legislature in which the urban element was greatly underrepresented. The Missouri Legislature has refused to permit a constitutional amendment authorizing St. Louis to expand its boundaries, which were defined by the 1875 constitution.

When statehood was proposed, Montana had only a dozen counties. To overcome objections from the sparsely settled regions, each county was allowed one member of the Senate. There now are fifty-five counties, many of which have been organized to procure additional senators (the same device used regarding towns by the Republican organization in Rhode Island). Silver Bow County, containing Butte, the largest city in Montana, has no greater voice in the Senate than Hill County, where 500 votes cast in a general election is a phenomenon. If all the urban counties, with more than half the population, were to combine in the Senate they would have only eleven votes against forty-four for the "cow counties." Of course, Montana politics revolves almost entirely around the Anaconda Copper Mining Company, and legislators are either "company men" or anti-company. One flower of the senatorial situation has been the metropolitan police law, passed some years ago at the behest of the small towns, whereby a member of the uniformed force of any municipality is assured life tenure. Under this act it has been found virtually impossible to dismiss incompetent and dishonest men, and when on numerous occasions policemen have been so dismissed they have gone into court and obtained reinstatement with back pay and damages.

In Vermont representation in the House is by towns. That is also the basis of representation in the constitutional convention in New Hampshire, through which all changes in the fundamental law must be initiated. New Hampshire senatorial districts are laid out on a basis of wealth. It was the Senate that killed the progressive measures of Governor Fred H. Brown, Democrat, and the lower chamber. Daylight saving is taboo in both New Hampshire and Pennsyl-

vania through rural influence, which in the latter State was the bulwark of Governor Gifford Pinchot's prohibition crusade. It did not, however, save him from being swamped in the Republican primary last spring. Each county in Pennsylvania and West Virginia has at least one representative. In Arizona Senate representation has been unchanged since 1918; New Mexico Democrats claim that the Republicans in 1911 so arranged the districts that it is impossible to elect a legislature Democratic in both branches. Urban counties are greatly underrepresented and the cities discriminated against in North Carolina.

In Alabama the small towns are dominant, with the "dirt farmers" or planters often siding with the cities, for instance in the attempt at the last session to stop Sunday movies in Montgomery and Mobile. In Oregon, Portland with one-third the population is fortunate in holding the balance of power between the eastern part of the State mainly interested in irrigation and the western half in which drainage is the paramount issue.

Rotten boroughs were eliminated in Wisconsin years ago, and the effect has been a wholesome drawing together of the urban and rural elements, neither side having the whip-hand over the other. Farmer members have given cordial support to the program sponsored by the American Federation of Labor, which included among many others bills for the following: a general eight-hour day; permission for peace-picketing; reduction in hours of labor for women employed in hotels; prohibition of night work in bakeries; delegation of authority to cities to prepare and distribute milk products as a municipal enterprise; labeling of prison-made goods; forty-four-hour week for women; free textbooks for public schools; strengthening of the part-time education law; strict regulation of activities of private detective agencies in labor disputes; granting of authority to cities to do public work by employing labor direct without a contract; initiative and referendum; repeal of the secrecy clause of the income-tax law to secure publicity of returns; strengthening of the child-labor law; old-age pensions.

In the fight a few years ago for abolition of the State National Guard, the farmers lined up with the Socialist members from Milwaukee. That proposal died in the Senate, but the same legislature did abolish compulsory military training at the State University at Madison and stopped the building of more State armories. But this is "radical" Wisconsin, a State that shares with Massachusetts the distinction of being at the bottom of the list in rotten boroughs.

The Massachusets definition of "legal voters" is unique throughout the country. At first the term was construed to mean potential

voters, but this interpretation was questioned by Benjamin Loring Young, Speaker of the House, and in reply to some queries by the legislature (permissible under Bay State law) the Supreme Court this year ruled:

First. The meaning and scope of the term "legal voters" in Articles XXI and XXII of the amendments are the voters who possess the qualifications prescribed by the constitution for voters and who have complied with statutory requirements so that they may lawfully cast their votes at an election.

Second. Legal voters as used in the same articles of amendments mean under the present statutes those persons who, possessing the constitutional qualifications to become voters, have proved them by taking the necessary steps to become duly recorded on lists of registered voters of the several cities and towns.

Third. The General Court in providing for the enumeration of legal voters may define those words to mean citizens of the commonwealth qualified to vote under the constitution who have complied with the laws so that their names are duly recorded on lists of registered voters of the several cities and towns. The General Court in making such definition would not change in any respect the meaning of those words as found in Articles XXI and XXII of the amendments to the constitution, but would thereby declare their signification in view of existing valid statutes.

Mr. Young thinks this system should be adopted throughout the country. Certainly the result if applied to the Federal Government would be revolutionary. For it would immediately reduce the representation of the South in the House of Representatives by at least 50 per cent. And therefore it probably is not feasible.

77. THE BICAMERAL PRINCIPLE IN THE NEW YORK LEGISLATURE[1]

By David Leigh Colvin

Whatever utility the bicameral system may have in certain situations and under certain circumstances, most of the familiar arguments which have been advanced in its favor seem to have lost much of their potency and some even their pertinency when used in behalf of that system as it exists in an American commonwealth.

Reviewing the arguments summarized in Chapter I in inverse order:

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(1) It is no longer the purpose of Constitution-makers to give a representation to special interests and classes in the State, particularly to the aristocratic portion of society, in order to counterbalance the undue preponderance of popular elements in one of the chambers. In the first State Constitution of New York, such was the avowed purpose, and in the second Constitutional Convention in 1821 effort was openly made by some of the most learned men in the convention to provide for the continuance of the special representation of the landed class. While special interests may gain control of one house and thus effectively block legislation hostile to them, yet such a contingency is contrary to the general intention of the members of the constitutional conventions.

While one of the strong arguments for the establishment of the United States Senate was to give opportunity for the special representation of States, there is no parallel argument which applies in the State legislatures.

(2) The argument that it restrains the propensity on the part of legislative bodies to accumulate power into their own hands seems to have little application while we have the check of the executive and the courts. In any event, the restraining tendency of the second chamber is not evident. The unifying power of the party seems to have nullified the restraining tendency. The lack of self-restraint has been exhibited so much that the people have had to establish a restriction on the legislature by means of additional constitutional limitations.

(3) The next claim for the bicameral system is that it destroys the evil effects of sudden and strong excitement and of precipitate measures springing from passion, caprice, personal influence and party intrigue. This argument is usually connected with the experience of revolutionary bodies or new bodies not yet fully accustomed to representative government, or without the check which State legislatures are accustomed to. It is also put forward by those who have a fear of popular government and is an argument which was more frequently heard in an earlier and transitory period when such a fear was more prevalent. To be a check upon such excitements, passions, and intrigues, it is important that the second house be not subject to the same influences or that there be a delay until there can be a sober second thought. It has been shown that the two houses are subject to the same influences, and that delay is not always interposed. There are possibly occasions when the bicameral system in this respect would be advantageous, but such occasions are in the nature of crises which are not met with in the study of a normal legislative session. It is conceivable that the two-chambered system would be

justifiable if once in a considerable period of time it should serve such a desirable purpose. But with the long habituation of the people to customary methods of legislation such crises are scarcely of sufficient frequency or importance to be the determining factor in deciding legislative structure, especially if there are other forceful arguments contrariwise.

So far as the sudden excitement, passion, or caprice with regard to a certain measure in an ordinary session is concerned, there remains the check of the governor and also the opportunity for recall by the house itself on sober second thought. At present, after bills have passed both houses, they are frequently recalled, one hundred and thirty having been recalled in 1910. There were none of the bills which passed one house and were defeated in the second in 1910 whose passage through the one house could be attributed to sudden and strong excitement or passion, and it is doubtful if any could to mere caprice or prejudice.

(4) The argument that it is more difficult to corrupt or wrongfully influence two bodies than one, and that the present system is a better defense against bad legislation because it requires the concurrence of two bodies instead of one in evil schemes seems apparently to have considerable validity. Yet the investigation has shown that, in the particular session studied, while a few questionable measures were checked by the second house, more of such measures, and those decidedly more questionable, passed both houses and required the check of the governor to stop them. It is not much more difficult to get such measures through two houses than it is to get them through one, provided the support of the party leaders is secured.

Toward measures which lack party support, the second house may become an obstruction whether they are good or bad, although, judging from the per cent. of measures passed, the second chamber can scarcely be renowned for its being a barrier to any class of measures. Yet the obstruction to good measures tends to offset its obstruction to the bad ones. While a great deal of harm can come from bad legislation, the check of the governor, the courts, and the next election all tend to limit that class of legislation. On the other hand, failure to pass good legislation is not likely to meet with censure at the ballot box to the degree that positive action is.

There are many who claim that, as there are likely to be more bad bills than good, it should be the policy to kill as many as possible. But it must be remembered that sometimes failure to pass needed legislation means retrogression and has deleterious results because of the growth and development of interests and influences which make it more difficult to cope with the situation later. Bad bills have other

checks than the second house. But if one house is corrupted, it serves as a formidable obstruction to good legislation for the duration of the term of that house, no matter how much the other house, the governor, and the people may desire it.

Owing to the possibility of preventing the passage of hostile bills, special interests have sought to control one house, their objects being made more easy of attainment because of the fact that the existence of two houses makes it more difficult to place responsibility than if there was a single chamber.

(5) One of the fundamental assumptions of the bicameral theory is that there will be a jealous and critical revision by a rival body of men. Yet in actual operation the newspapers facetiously refer to a mock antagonism between the houses as a phenomenon which occurs but once a year. It would be difficult to produce evidence to show when they are either rival or jealous. Of the bills of 1910 which were defeated or amended by the second house, it cannot be asserted that a single one was lost on account of jealousy or rivalry.

In the exceptional years when the two houses are controlled by opposite parties, the opposition is due to party spirit rather than to the rivalry between the houses. It has been shown in a year when such a situation occurred a small amount of legislation was passed.

The argument in favor of an independent review of legislation by different minds acting under different and sometimes opposite opinions and feelings hardly applies because the two houses are constituted practically alike. The members are subject to like influences. As a rule they are members of the same party and dependent upon the same party organization. In general, they have the same class of constituents, and are subject to the same pressures. There may be a divergence in the sum of the personal equation of the two houses, but it has been shown that the individual is of little importance compared with the strength of party organization with its necessary assumption of responsibility for the legislative action taken.

Upon certain classes of questions, especially those of less importance and those on which the party organization is neutral, the review may be valuable and is not to be minimized. But upon the more important questions on which the party takes a posititon or those on which the responsibility is serious, the review of the second chamber is not sufficiently independent to accomplish the ends of those who seek such a reconsideration. But upon the minor measures the question remains whether it would be better for fuller consideration in one house or different consideration by two.

One circumstance to be taken into account in requiring a bill to pass through two chambers is that almost always the final action is

determined by the second house, which may or may not be the better decision. After the second house took action in only a very few cases was there any effort to make the action of the second house more closely correspond to that of the first. In practice the action of the second house is assumed to be the desirable decision. The first house, in order to get anything, accepts the amendments of the second. In some cases the action of the second house may be an improvement, but in other cases it may be the contrary. In actual practice the two houses seldom seek a middle ground, at least not by formal methods.

(6) When considering the final argument for the bicameral principle, that it serves as a check on hasty, ill-considered, and careless legislation, there is danger of becoming confused by the great mass of measures with which a legislature has to deal. There are so many bills that careful and adequate consideration is exceedingly difficult in the short period of the session, and with the many demands upon the time of most legislators.

The bicameral system permits consideration by two different bodies. Two hasty considerations may not be as good as one thorough one, but they may be better than one hasty one. The effect of a second consideration is shown by the fact that nineteen per cent. of the bills passing one house were killed in the second, and fifteen per cent. of the bills passing both houses were amended in the second. However, it has been noted that most of the bills defeated were comparatively unimportant ones. The number would probably have been considerably less if the first house had accepted full responsibility.

Two considerations do not necessarily mean a double consideration. There is a tendency to assume that a subject has been considered in the other house when the consideration has been very inadequate; or sometimes one house hastily passes a bill with the expectation that the other house will deal with it more carefully. There is frequently a shifting of responsibility to the other chamber. It is customary for amendments of the second house to be accepted without question. It is also customary to advance bills advocated by the party leaders. The important measures are determined upon by the party leaders and upon these the second chamber is of little additional usefulness in furnishing consideration. The present system tends to make the party boss or group of party leaders the determiners of what shall be passed, as it is the party's function to control both houses.

So far as real consideration is concerned, it was very inadequate in both houses. It would probably be better to have a thorough consideration in one chamber than a hasty, semi-irresponsible one

in two. Whether the desired end could be practically achieved is a question whose answer cannot be determined by this investigation. With the opportunities for consideration which one house can afford in the various stages it seems that one chamber might be made sufficient. Whether one or two chambers, there should be provisions for a lessened number of bills, fuller knowledge, greater publicity, increased opportunities for persons outside to make their views known, and more direct responsibility. Mr. Amos's contention in favor of a thorough discussion of one body, instead of successive new discussions, seems to have weight. It has been observed that the most difficult problems before the session of 1910 had been investigated by joint committees.

With regard to the interposition of delay between the two chambers, it has been shown that this is not sufficiently guaranteed and the more dangerous bills are likely to be those rushed through both houses without much of an interval elapsing.

After reviewing the work of the legislature and considering the bills which the second chamber checked, it can scarcely be claimed that the second chamber is an effective check on hasty, ill-considered, and careless legislation. The bills defeated partake little more of this character than many of the bills passed. The quantity checked was not unimportant, but the quality of the selection did not show great discrimination. More undesirable bills passed than were killed, and the executive was impelled to kill more bills than both second houses combined.

The party has been described as the chief factor in harmonizing the two houses. It greatly lessens the value of the review by the second house. It makes it easier to pass undesirable legislation because it can force it through on the one hand and on the other the individual legislator can escape punishment at the next election by being submerged in the party ticket.

The party can make the consideration as careful and thorough or as hasty as it desires. It can interpose delay or rush the bill through. However, the party has its limitations. It cannot offend the public to the degree of causing a defection which will result in a loss of power. The organization is not always strong enough to rush measures through, and on the great mass of the less important measures it does not aim to dictate. In these cases, the second chamber acts as a check to a certain degree. It has been shown that most of the bills on which there was opposite action by the two houses were of small importance.

The study has of course been made under the situation where there is a two-party system. If the situation should arise when several

parties should be represented in one house, none having a majority, there might occur fortuitous or temporary coalitions which would make a second chamber more useful than at present.

It is thus seen that most of the arguments which have been made in behalf of the bicameral system fail of their cogency under the present practice, yet there are one or two which are worthy of consideration.

The bicameral system has the advantage of age and the habituation of the people to it, and the conclusions which can be reached after studying its operations in one State, chiefly confined to a single year, cannot be decisive enough or of sufficient weight to positively recommend a change in an age-old system, yet the suggestion of the possibility of a modification should not be as much out of place as some would have us believe. Reference has been made to the proposal for a single chamber in Ohio, Kansas, and Arizona, and to the fact that it is in successful operation in seven neighboring provinces of Canada, so it is not beyond the range of practical consideration. The single-chamber system would be in line with the movement for a more direct government as exhibited in the effort for the direct election of senators, direct primaries, commission government, and the initiative and referendum—the effort to make self-government, as President Wilson expressed it, a "straightforward thing of simple method, single, unstinted power, and clear responsibility."

If the legislature were reduced to a single chamber there would need to be several provisions in order that the strength of the present system might be conserved and the weaknesses eliminated. To this end the body should be comparatively small. Bluntchli pointed out that four eyes are better than two. But that does not prove that four hundred in a legislative body will perform their functions more efficiently than one hundred. It has been shown that, as an amending body, the smaller house is very much superior. It is quite generally recognized that large legislative bodies defeat their own ends and the real legislative power becomes centralized in a small, forceful group which is adapted for decisive action rather than for deliberation or consideration. So it would be better to have the legislative body approximately the size of the present senate, about fifty members.

As the problems with which legislation must deal become continuously more complex and as the State activities become more extended, the need for capable legislators familiar with all phases of State government becomes more imperative, and the aim should be to have men who shall give their entire time to their legislative work. The legislature should be composed of men more expert. Sufficient salary should be given that competent men would be justified in giving the business of legislation their undivided attention.

Reference has already been made to the need of those provisions which would lessen the number of minor local or special bills, safeguard the stages for consideration, provide for the assembling of information, for publicity, for the intervention of time, and for opportunities for the wishes of the people to be expressed.

These provisions are needed, whether the legislature shall be bicameral or unicameral. If they are adopted in combination with the unicameral system there would be lacking practically none of the advantages of the bicameral system. If they are adopted in combination with the bicameral system the legislative situation would be improved, but there would remain some of the disadvantages of the two-chambered system.

In any event, the trial of a safeguarded unicameral system would not be a very dangerous experiment.

Beard (4th Ed.), pp. 592–621.
Mathews, pp. 141–173.
Kimball, *State and Municipal Government,* pp. 194–206.
Dodd, *State Government,* pp. 156–187.

XX

LEGISLATIVE PROCEDURE

78. THE BEHAVIOR OF LEGISLATIVE GROUPS: A METHOD OF MEASUREMENT[1]

By Stuart A. Rice

Politics and sociology must be behavioristic if they are to be quantitative in method. Attitudes and motives in themselves offer a valid subject of scientific inquiry, but they are not susceptible of measurement, and the subjective bias of the investigator is invariably present to cast doubt upon his conclusions. It is only when opinions and attitudes find expression in conduct that they yield to exact analysis. The first task in creating a science of politics, therefore, is a search for behavioristic materials representative of the intangible subjective elements of political activity. The second task is to devise quantitative methods for measuring these materials.

The most tangible and measurable units of political behavior are *votes*. They are tangible because simple and precise. They are measurable, for although each is really a *gross measure* of opinion, the value of which may differ widely in different individuals, they are nevertheless assumed to have equal value and are counted and recorded officially.[2] The determination of popular attitudes by an analysis of popular votes upon a variety of issues would be the preferred method if the data were available. A few such analyses of referendum votes have been made.[3] Unfortunately for this purpose the number of issues that have been acted upon by referendum is still small. Moreover, an essential requisite is lacking in any popular vote conducted over a wide area, namely, identification of the individual votes with the individual voters.

[1] Reprinted from the *Political Science Quarterly*, March, 1925, by permission of the author and of the editors.

[2] Cf. the writer's note, "The Political Vote as a Frequency Distribution of Opinion," *Journal of the American Statistical Association*, March, 1924.

[3] Cf. for example, "The Political Thought of Social Classes," by William F. Ogburn and Delvin Peterson, *Political Science Quarterly*, Vol. XXXI, pp. 300–317; "The Referendum in Washington," by Stuart A. Rice, *Proceedings of the National Conference of Social Work*, 1923, pp. 508–510.

Election returns in the aggregate—the only form in which they are usually available—must be dissected if they are to be of value in estimating the forces of opinion at work in the electorate. Just as biological science made no progress in discovering the laws of heredity until it dealt with unit characters, political statistics will be meaningless as refined tools or products of measurement until they enable the investigator to distinguish the votes of rural, urban and small-town dweller; Protestant, Catholic and Hebrew; farmer, laborer and capitalist; native and foreign-born in their numerous varieties. Intersecting groups such as these mould the *mores* of individuals attached to them. They determine those characteristic, habitual and largely unconscious individual attitudes that have their resultant in "public opinion" and the "popular verdict at the polls." Hence to understand the result of an election one must understand the groups in the electorate and the part played by each as a causal factor in the result. But as already pointed out, the data from which this part might be measured are largely unavailable.

A similar difficulty is not encountered in dealing with representative bodies. Roll-call votes in Congress and American legislatures are cast openly and recorded officially. But may the votes of legislators be regarded as representative of the opinions of those who select them? The correlation would obviously be imperfect, and might not even be high. Yet with full cognizance of the numerous influences tending to deflect the legislator from a normal expression of his personal attitudes, the writer contends that he is representative of the groups in the electorate to which he belongs—at least to a degree. He is representative, first, because voters tend to select men of their own "kind" to office, even though the similarity in kind may be based in the voter's "identification" of himself with the social, economic or intellectual attributes of the office-holder. The legislator is representative in a second sense, based upon the first, because he responds to legislative issues on the whole in about the same manner as would his fellow group members in the constituency. However amenable to "influence" he may be, there is a constant "strain" in the legislator's behavior toward consistency with the *mores* of his various groups. In a sufficiently large number of cases, this strain toward consistency with his social heritage is certain to affect any numerical indices of the legislator's behavior that may be devised. Measurements of group behavior in legislative bodies, therefore, are regarded by the writer as indicative of the attitudes of corresponding groups in the electorate. Objective tests of these *a priori* assumptions are possible and should be undertaken. Regardless of their validity, however, measurements of legislative behavior have a value in themselves, not only

to the theorist but to the practical politician as well. This will be apparent in the pages that follow.

The present paper, then, has two general aims: first, to present a method for the measurement and comparison of the voting behavior of groups in legislative bodies; second, to illustrate the method by presenting the results of analysis of the cohesion and comparative resemblance of certain parties and blocs in the New York State Assembly of 1921 and in the United States Senate of the Sixty-eighth Congress. As a subordinate aim the writer hopes to add precision to a number of terms in common use in political discussion, such as "cohesion," "swing" and party "wing."

The first test that any legislative group must meet concerns its *cohesion.* Are the members of Group A in their voting behavior more like each other than are the members generally of the more inclusive Group B which includes not only A but non-A individuals as well? For example are the Republican members in a state senate more alike in their votes than are the members of the senate generally? If so, it may be inferred that they are more like-minded and the Republican group may be called more *cohesive* than the senate as a whole. Similarly it may be asked whether the Republican senators are more or less cohesive than are the Democratic senators. Or take a question still more definite: Was the tri-partisan "progressive" or LaFollette bloc in the Senate of the Sixty-eighth Congress more or less cohesive than were the various senatorial groups included under each of the formal party designations?

The writer has been able to obtain precision in answering such questions by the aid of what he has called an *index of cohesion.* This index is based upon the theory of probability.

If roll-call votes were cast according to pure chance, the most probable result in the case of any roll call would be a division in which fifty per cent of the members voted affirmatively and fifty per cent voted negatively. It is evident that the cohesion within the entire body in such a case would be *nil.* Hence a measure of cohesion will be obtained if we determine the degree of departure from the most probable chance distribution of votes, toward complete uniformity of action, i. e., a roll call in which all members vote alike. Referring only to the percentage of affirmative votes for the sake of convenience, it is apparent that zero cohesion (0.0) will be indicated by a roll call in which fifty per cent of the members vote affirmatively. Absolute cohesion (100.0) will be indicated whenever the group is unanimously either for or against a measure; i. e., when it votes either 100 per cent or 0 per cent in the affirmative. Further, an index of cohesion intermediate between 0.0 and 100.0 will be determined by

the degree to which the percentage of affirmative votes departs from 50.0 in either direction toward 0.0 or 100.0. For example, when the votes of the group on a given measure are 30 per cent in the affirmative or 70 per cent in the affirmative, the index of cohesion will in both cases be 40.0, for in both there is a $^{2}\%_{0}$ or 40 per cent departure from 0.0 cohesion toward 100.0 cohesion. When the index of cohesion upon a series of roll calls is to be found, the writer has employed the arithmetic mean of the indices derived for the various individual roll calls in the series.

Allied to the problem of group cohesion, and likewise requiring measurement, are questions of the extent to which various groups are alike or unlike in their voting responses to political issues. It is useful not alone to the political scientist but to many laymen to know whether farmers and workingmen, when thrown together in a state legislature, tend to be in mutual opposition or in mutual support. If they tend to be in mutual opposition with respect to prohibition and its enforcement (as they do) are they likewise in opposition with regard to labor legislation or political reform? Or, to use the former illustration, was the LaFollette bloc in the Sixty-eighth Congress in closer affiliation with the regular Republican party or with the regular Democratic party? In either case, how much closer? Answers to such questions based on a "hunch" are unsatisfactory. Measurements are needed.

To place beside his index of cohesion within groups, therefore, the writer has derived an *index of likeness between groups*. The possible range of this index is likewise from 0.0 to 100.0. If, for example, all Republicans in a legislative session vote affirmatively on a given roll call while all Democrats vote negatively, it is obvious that the behavior of the two groups, so far as it can be expressed by votes, is absolutely dissimilar. One is 100 per cent affirmative, the other 0 per cent affirmative. The arithmetic difference between the percentages of affirmative votes in the two cases is 100.0. This figure thus gives an index of absolute difference in voting behavior between the two groups. If, on the other hand, Republicans and Democrats *both* divide, at the same time, 50–50, or 70–30, or 85–15, the responses of the two groups, as groups, will in each case be the same. It is to be inferred in such cases that the distribution of votes is determined by factors unassociated with party divisions, and Republicans and Democrats may be said to vote *alike* on the issue at hand. The arithmetic difference between the respective percentages of affirmative votes in each such case will be 0.0, and the complement of this figure, 100.0, will be the index of likeness. Thus the complement of the arithmetic difference between the percentages voting in the af-

firmative in each of two groups gives an index of likeness between them, so far as their voting behavior is concerned. The index of likeness upon a series of roll calls may again be regarded as the arithmetic mean of the indices derived for the separate roll calls in the series.

The use of the two indices will now be illustrated, first, by an analysis of roll-call votes in the New York State Assembly of 1921. This was the year of "normalcy" at its height. A number of "Lusk" bills, together with the disqualification of a Socialist member, were carried with ease by an overwhelming Republican majority in the New York legislature.

The Assembly was composed at the outset of 150 members. Eight groups were selected for analysis and comparison as a result of preliminary study of the roll calls recorded in the Assembly Journal. These were: The Assembly as a whole, the Republicans as a whole, the New York City Republicans, the "Up-State" Republicans, the Democrats, the Socialists, the Farmers and the Labor members. It so happened that all of the members classified as Farmers or Laborites were also Republicans. Those placed in these categories were members who met certain objective documentary test concerning occupation and residence. All of the Democrats but two were from New York City. We may classify the members as indicated in the two following tables in order to show the relationships existing between the several groups:

TABLE I

Composition of the New York Assembly, 1921, by Parties and Two Selected Occupations

Republicans		119
Farmers	27	
Laborites	5	
Unclassified	87	
Democrats		28
Socialists		3
Assembly as a whole		150

TABLE II

Composition of the New York Assembly, 1921, by Parties and Localities

Up-State Members		88
Republicans	86	
Democrats	2	
New York City Members		62

Republicans	33
Democrats	26
Socialists	3
Assembly as a whole	150

Of 1296 roll calls taken during the session, all but 255 were unanimous. Out of an estimated total of 175,000 votes cast, only 7,595 or 4.3 per cent were cast in the negative. The study has been confined, therefore, to roll calls in which there were six or more opposing votes cast against the majority action.[4] The results of the study are presented in Tables III and IV, which follow.

TABLE III

Indices of Cohesion within Various Groups in the New York Assembly, 1921

1 Group	2 Number in group	3 169 Roll Calls with 6 or more opposing votes	4 94 Roll Calls on "State Issues"	5 59 Roll Calls on New York City Issues	6 8 Roll Calls on Prohibition
Assembly as a whole	150	51.4	44.9	....	15.6
Republicans	119	74.8	66.0	....	44.9
Up-State Republicans	86	87.9	80.7	96.5	89.9
New York City Republicans	33	65.5	63.9	62.1	68.7
Democrats	28	77.4	73.0	79.6	100.0
Socialists	27	94.0	94.1	....	71.3
Farmers	3	91.2	85.6	....	100.0
Laborites	5	68.0	59.9	....	12.5

[4] The high degree of like-mindedness indicated by the large proportion of unanimous roll calls is illusory owing (a) to constitutional specification of the occasions on which roll calls must be taken in the passage of a measure, (b) to the legislative device for evading the constitution in this respect known as the "short roll call." A short roll call is almost invariably indicated when the recorded number of votes in opposition to the majority action is ten or less. To be recorded in opposition on a short roll call, the member must rise in his seat and so request after the presumptive roll has been taken. For a precedent for disregarding unanimous and near-unanimous roll calls, cf. A. Lawrence Lowell, "The Influence of Party upon Legislation in England and America," *Annual Report of the American Historical Association,* Vol. I, 1901, pp. 321–542.

The number of groups of assemblymen whose votes were analyzed might have been extended to include categories based on religious or other lines. Similarly, the roll calls included in the study, 169 in number, might have been classified into an indefinite number of subordinate categories. Three sub-classes of measures only are shown in Table III. "State issues" include all measures other than those of purely local character. Among 76 roll calls affecting single municipalities or counties, 59 were selected which bore upon the affairs of New York City alone. Thus roll calls upon "state issues" and "New York City issues" are referred to in columns 4 and 5, respectively. In column 6 are shown the indices of cohesion for 8 roll calls affecting the issue of prohibition and its enforcement. The same classification of measures is employed in Table IV.

TABLE IV

Indices of Likeness Between Various Groups in the New York Assembly, 1921

1	2	3	4	6
Groups Compared	169 Roll Calls with 6 or more opposing votes	94 Roll Calls on "State Issues"	59 Roll Calls on New York City Issues	8 Roll Calls on Prohibition
Whole Assembly and Farmers.....	78.8	76.9	.....	58.1
Whole Assembly and Laborites....	86.6	85.4	.....	95.1
Whole Assembly and Republicans..	87.3	88.1	.....	85.3
Whole Assembly and Democrats...	49.5	53.0	.....	41.9
Whole Assembly and Socialists...	48.9	.....	.....	54.6
Republicans and Farmers.....	90.4	88.5	.....	72.5
Republicans and Laborites.....	88.3	.....	.....	83.8
Farmers and Laborites.....	84.8	.....	.....	60.2
Socialists and Laborites.....	52.9	.....	.....	56.1
New York City Republicans and Up-State Republicans.....	74.4	86.4 79.9	75.5	20.6
New York City Republicans and Democrats.....	53.0		50.9	84.5
Farmers and Democrats.....	....	60.6	.....	0.0
Farmers and Socialists.....	36.5	70.8	.....	12.4
Republicans and Democrats.....	37.1	.....	.....	28.0

A number of conclusions might be drawn from Tables III and IV. Still others might be disclosed if a larger number of the possible comparisons of group likenesses were carried through in Table IV. A few of the more significant points indicated in the tables will serve to illustrate the utility of the method:

1. The New York City Republicans, in effect, formed an intermediate party group or bloc between the Up-State Republicans and the Democrats. When all measures are taken together, this bloc of New York City Republicans was more like its Up-State party associates (74.4) than it was like the Democrats (53.0). Yet on such an issue as prohibition, its likeness with the Up-Staters was represented by the index 20.6 as compared with an index of 84.5 between itself and the Democrats. In cohesion, the New York City Republicans were low—65.5 as compared with 87.9 for the Up-State Republicans and 77.4 for the Democrats. This fact is suggestive of a conflict between party loyalty on the one hand, tending toward association with the Up-State Republicans, and sectional loyalty upon the other, tending toward association with the Democrats, all but two of whom represented New York City districts.

2. The Republican farmers formed a highly cohesive group (91.2) within the relatively cohesive group of Up-State Republicans (87.9). It is apparent that the common occupation is a cohesive influence. The cohesion of farmers was exceeded only by that of Socialists (94.0) who were represented a portion of the time by only two members.

3. The laborites showed relatively low cohesion (68.0) although this was probably the result of their division between the Up-State and New York City wings of the Republican party. The Republican laborites showed considerably more likeness to the Socialists (52.9) than did the Republican farmers (36.5).

4. The several groups are arranged in the same order with respect to their cohesion whether all roll calls entering the study or only those concerning "state issues" are considered. In each case, however, the cohesion of the group is less in the case of "state issues." We may infer that local issues, particularly those affecting the city of New York, promote a more uniform response within each group than do issues of more general state-wide significance. It is probable that the long-standing quarrel between the city and the Up-State districts tends to produce a more habitual response in each group whenever the issue is presented, whereas "state issues" are more likely to be considered upon their merits and hence produce a more varied response in each group.

5. Up-State Republicans show almost perfect cohesion (96.5) on the 59 roll calls specifically affecting New York City. They are considerably more united upon these matters than upon any other type of measures segregated, and considerably more united than are the Democrats (79.6). Hence it may be said that common attitudes regarding the affairs of New York City constitute the outstanding characteristic of the voting behavior of the Up-State Republicans. The New York City Republicans, on the contrary, occupy with regard to city issues the same intermediate position as a separate but not very cohesive group that they occupy upon questions generally.

6. The Assembly was more sharply divided on the issue of prohibition than on legislative issues as a whole. There were eight roll calls taken in which this issue was mainly involved. In each case Farmers (who were all Republicans) and Democrats were completely in agreement among themselves, but in opposite directions. That is, the index of likeness between Farmers and Democrats on this type of issue was 0.0.

Without further inferences from Tables III and IV, the writer hastens to a second illustration of the use of the two indices that have been described. This is found in an analysis of the votes of the so-called "progressive" or LaFollette bloc on the first fifty-four senatorial roll calls in the Sixty-eighth Congress.

The formal party affiliations of United States senators are of record. Their affiliations or sympathies with conservative, progressive or other blocs are not. On the basis of a variety of criteria, such as attendance at conferences of "progressives," the writer has segregated the following list of thirteen senators in the Sixty-eighth Congress, composed of six Republicans, five Democrats and two Farmer-Laborites; LaFollette, Frazier, Brookhart, Norris, Ladd and Borah, Republicans; Wheeler, Dill, Sheppard, Walsh of Massachusetts and Ashurst, Democrats; Shipstead and Johnson of Minnesota, Farmer-Laborites. For convenience this group of thirteen senators may be called "radical." Similarly, a larger list of twenty-two senators who may be termed "progressive" has been formed by the addition to the first thirteen of nine others with a reputation for progressive leanings, who failed, however, to meet the first criteria of selection. The "progressive" group thus includes the "radical." The various indices of cohesion that have been derived are shown in the following table:

TABLE V

Cohesion of Various Senatorial Groups in the Sixty-eighth Congress

Group	First 54 Roll Calls taken in the Sixty-Eighth Congress	47 Roll Calls derived by omitting 7 of comparative unimportance
The Senate as a whole.....	44.2	46.5
Democrats (all so listed).....	63.6	63.1
Republicans (all so listed).....	70.0	66.3
"Radical" group of 13.....	66.6	71.0
"Progressive" group of 22.....	62.7	67.2

It is apparent from Table V that when all fifty-four roll calls were considered, the "radical" and "progressive" blocs were slightly less cohesive than the Republicans, including under the latter term all who gave this as their party designation in the Congressional Directory. The "radical" bloc, however, was more cohesive than the Democrats. Among fifty-one non-unanimous roll calls, the "radical" bloc was more cohesive than either Republicans or Democrats in the case of eighteen, and more cohesive than (or equally cohesive as) at least one of these parties in the case of twenty roll calls additional, leaving thirteen or 25.5 per cent in which both parties exceeded the "radical" bloc in cohesion.

But among the fifty-four roll calls, some were of greater importance than others. In the last column of Table V will be found the indices of cohesion when seven roll calls upon such matters as the award of individual war pensions and the election of a doorkeeper to the senate were eliminated. In this column it will be discovered that if the more important roll calls alone be considered, both "radical" and "progressive" blocs were more cohesive than either of the parties. It should be remembered that the insurgent tendencies of the progressive and radical senators tend to diminish the cohesion of the formal party organizations. It is probable, though it has not been determined, that the radicals were not so cohesive as the "regulars" in either of the old parties when taken by themselves. Nor has the writer employed the index of likeness to determine whether the radicals and progressives were more closely aligned to the Republican or the Democratic group, for it is hardly to be questioned that their affiliations were with the latter.

The illustrations that have preceded have been comparatively simple because they did not involve as variables the factors of party affiliations themselves. But suppose it is desired to compare the cohesion of two groups cutting unequally across party lines: for example, the cohesion of farmers and laborites when all farmers are Republicans while laborites are found in both parties. A higher index of cohesion among farmers in such a case would not be significant, for the major vote-determining influences are associated with party affiliation. At least one practicable means of eliminating the party variable when it is thought to invalidate the result is by the method of classification. Republican farmers may be compared with Republican laborites or with Democratic laborites, but not with a bi-partisan labor group. The indices of cohesion and of likeness gain significance (when the party variable is held constant in this manner) by comparison with the indices that would be *probable* on the basis of party affiliations alone. Thus it would be "expected" that the index of likeness between Republican farmers and Democratic laborites would equal the index of likeness between all Republicans and all Democrats if farmers and laborites constituted *random samples* of their respective parties. If in fact the former index is the smaller it is clear that farmers and laborites have a tendency to differ in their votes *relative to their party affiliations,* i. e., more than their party affiliations would call for. Similarly, the cohesion of Group A in Party X relative to the cohesion of X, when compared with the cohesion of Group B in Party Y relative to the cohesion of Y, will indicate whether A or B is the more cohesive relative to party affiliations.

When subordinate groups A and B are both wholly affiliated with Party X, a comparison of their respective indices of cohesion may be made directly. But it is not so simple to ascertain whether they are tending toward like or unlike voting behavior. At this point precision must be sought for the concept of "swing." Do A and B tend to "swing" in the same or in opposing directions within the common Party X? Are they, that is, in opposing wings or in the same wing of that party? If the number within the party be large as compared with the numbers in the subordinate groups, the "swing" may be safely determined by comparing the percentage of affirmative votes in the party group as a whole with the respective percentages of affirmative votes in the two subordinate groups. For example, in one roll call on the question of prohibition enforcement in the Pennsylvania House of Representatives of 1919 the Republican group with 175 members voting was 51.4 per cent in the affirmative on a particular presentation of the issue. Of seven Republican farmers,

one, or 14.3 per cent was in the affirmative, while of eight Republican laborites, all or 100.0 per cent were in the affirmative. It will be clear that farmers and labor members, as occupational groups, "swung" to opposing wings of the common Republican party on this particular issue.

Similarly, it is found that the farmer and labor groups in the New York Assembly session analyzed above tended to swing to opposite wings of the common Republican party group in the larger number of roll calls taken. For reasons which need not be related here, exact measurement of the amount of swing is difficult, but a mere summation of the number of cases in which the swing is in the same direction as compared with the number in which it takes place in opposing directions, will usually suffice for the inquiry in hand.

Close adherence to the technique of comparing an actual index of cohesion or likeness with the index that would be expected on the basis of party affiliations alone, will provide the student with answers at once logical and quantitative to many common problems of group action in politics—problems now being approached by intuition and impression; in other words, on the basis of "hunch." [5]

79. OUR LEGISLATIVE MILLS[1]

MASSACHUSETTS—DIFFERENT FROM THE OTHERS

By A. C. Hanford

The Massachusetts legislature or General Court, as it is designated in the constitution, consists of a house of 240 members and a senate of 40 elected for a term of two years. Until recently the term was only one year but it was found that annual elections placed an excessive burden upon the electorate, increased the expense of government and that frequent campaigns interfered with the work of the members. As a result the constitution was amended in 1918 to provide for biennial elections. The members receive $1,500 per year. The legislature meets annually and there is no restriction on the length of the session, which usually continues for five or six months. There has re-

[5] For a more thorough examination of the principles and limitations of the method he has sketched, as well as for further illustrative material, the writer must refer to chapter vi and the appendices of his study, *Farmers and Workers in American Politics,* Columbia Studies in History, Economics and Public Law (New York, Longmans, Green & Co., Agents, 1924).

[1] Reprinted from the *National Municipal Review,* January, 1924, by permission of the editor.

cently been some agitation in favor of biennial sessions, but in 1923 the legislature rejected a proposed constitutional amendment authorizing such a change.

Unlike the legislatures of most of the New England states, especially Connecticut, Rhode Island, and New Hampshire, representation in both the house and senate is based upon population and not according to local units of government and there are no limitations designed to restrict urban representations. This eliminates the "rotten borough" system which prevails to some extent in other parts of New England and also avoids one of the most serious problems in state government, namely that of discrimination against representation from cities.

FEATURES OF MASSACHUSETTS SYSTEM

The late Professor Reinsch wrote in 1906: "The General Court of Massachusetts is in all respects nearest the people, and most responsive of any American legislature to intelligent public opinion." (*American Legislatures and Legislative Methods,* p. 174.) Writing a dozen years later in 1918, Dr. H. W. Dodds expresses the opinion that "It is not too much to say that the success of Massachusetts, the state in which the committee system is most highly developed, is due in considerable measure to her joint committees. . . . Massachusetts avoids the tumult of the last days more successfully than do other states." (*Procedure in State Legislatures,* pp. 50, 99.) Dr. W. F. Dodd in his recent book on *State Government* (1922) bears out a similar conclusion when he writes: "In Massachusetts each step upon a bill is substantially forced after the preceding step has been taken. The legislative organization there is far from perfect; indeed Massachusetts is one of the states in which there is still a great abuse in the matter of laws of special application. But in respect to general procedure much can be learned by other states from the Massachusetts rules." It is significant that none of these authorities is a resident of Massachusetts so that their opinions are free from any suspicion of native partiality.

What are the reasons for the relative success which the Massachusetts legislature has achieved? The answer to this question is to be found in the absence of any limitation upon the length of the session; the joint committee system; the custom that every proposed bill should be given a public hearing before a committee; the rule in regard to the date for introducing measures; the rules requiring not only that all measures be reported out of committee but that such reports shall be made before a certain date; the absence of com-

mittees highly privileged under the rules; the leadership of the speaker and president of the senate; the governor's influence upon legislation; the recent budget system; the wide use of unpaid special commissions to investigate and report on proposed legislation of importance; and the central location of the state capital.

JOINT COMMITTEE SYSTEM

All of the standing committees except those on ways and means, judiciary and the procedural committees on rules, engrossed bills, bills in the third reading and the house committees on elections and pay roll are joint committees. For certain purposes the separate committees on rules meet jointly, the committees on judiciary almost always meet jointly, and since 1920 by special arrangement the house and senate committees on ways and means have held joint sessions on the budget so that practically all the work is by joint committees. The committees consist usually of three or four members from the senate and eight or eleven from the house and a senator is always chairman. A member from the house is selected as clerk of the committee thus eliminating the expense and political abuse involved in employing paid secretaries for such work. This method of providing for committe clerks has also been highly satisfactory from the point of view of efficiency because there is an incentive on the part of the clerk to handle the affairs of his committee in a thorough and business-like manner in order to obtain important committee appointments and possibly a chairmanship in the future.

After consideration by a joint committee bills are reported to either branch, except money bills which are always reported to the lower house, an attempt being made to secure an equal distribution of business between the two houses. If passed the bill goes directly on the calendar of the other house without a second committee stage. The joint committee system saves time and effort on the part of the members of the legislature and also that of the citizens who oppose or favor a measure; it makes possible a more careful and thorough consideration of measures; gives the less experienced members of the house the benefit of the advice and suggestions from the older members of the senate; avoids shifting of responsibility and tends to reduce friction between the houses thus securing some of the advantages of a unicameral system without any of its defects. In other states there seems to be a somewhat fanciful objection to the joint committee system on the ground that the larger number of representatives could outvote the senators and that trouble would arise over assigning the

chairmanship to a senator, but in Massachusetts this has caused no difficulty and there is not a trace of friction.

There are at present thirty joint committees. Each senator is on three or four such committees and if he belongs to the majority party, is generally the chairman of at least one. Each representative usually serves on one or two committees and there is a rule that no member shall be required to be chairman of more than one. As in all legislative bodies certain committees such as those on ways and means, judiciary, cities, etc., are the most heavily burdened but there is a fairly equitable distribution of business among the other committees, only about nine of which received in 1923 less than twenty-five bills. While there are perhaps a few more committees than necessary the multiplicity existing in many states is avoided; members do not find their efforts divided among six to nine different committees as in some other legislative bodies and practically all of the committees are integral parts of the legislative system carrying a fair amount of business.

None of the committees is especially privileged in regard to the control of debate or in the reporting of bills referred to it. The committee on rules in each branch is, however, a rather powerful body. The presiding officer of each house is chairman of his respective committee and the majority floor leader as well as the leading members of the house and senate have seats thereon. To this committee are referred all measures that are introduced after the date set for the filing of bills and the committee reports to its respective house whether or not the rule shall be suspended to allow introduction. Other matters such as orders authorizing committees to travel or to employ stenographers or involving special investigations go to this committee for report. The committees on ways and means and judiciary also have rather large influence due to their importance and because of the fact that they contain among their membership the leaders of the majority party. But these committees do not derive their prestige from rules which give them control over debate or permit them to change the regular order of business.

PUBLIC HEARINGS AND CHECKS ON COMMITTEES

Custom requires that every bill no matter how trivial or unimportant should be given a public hearing before a committee, the date of which is publicly advertised, through the newspapers and by official bulletins. Oftentimes it is necessary to give more than one hearing on a measure and in fact the more important hearings may extend

over several days. The committee hearings are for the most part conducted in an orderly fashion with ample opportunity to both the opponents and proponents to present their arguments. Hearings on measures of importance to the general public or to a large group of citizens are well attended and the proceedings are fully reported by the press of metropolitan Boston. The writer has seen as many as five or six hundred persons at a committee hearing on some important bill, such as proposals for repealing the daylight saving law, increasing the fees on motor vehicles, prohibition enforcement, granting equal pay to men and women teachers, etc. This system produces results that are highly satisfactory. It gives interested parties an opportunity to express their opinions and air their grievances. At the same time the members obtain valuable information on proposed legislation and are able to gauge the extent of popular demand for measures submitted for their consideration, while the general public is educated through the newspaper accounts. The successful working of this system is undoubtedly due in large measure to the location of the capitol at Boston in the center of a metropolitan area containing about half the population of the state and within easy reach of three-quarters of the people of the commonwealth. Although considerable publicity is given to the hearings, especially the important ones, through the newspapers, it is unfortunate that the committees do not keep official records of such hearings nor of their executive sessions which are accessible to the public.

Committees not only grant a public hearing on each measure but the joint rules require that every bill shall be reported to the whole house on or before the second Wednesday in March which may be and usually is extended to the second Wednesday in April. Upon the expiration of this period all measures in possession of a committee must be reported within three days. This report must recommend that such bills be referred to the "next General Court," which means that the measure goes over to the next session when it may be taken from the files by any member. This report is used in cases where the committee is unable or does not wish to reach agreement. But at this stage any member may move that the original bill be substituted for the report "reference to the next General Court" and if such a motion receives the required majority the measure is brought before the whole house. Every measure must, therefore, be reported by the committee to which it has been referred prior to the last month or two of the session either favorably, adversely, or by "reference to the next General Court." Committees are thus kept from pigeonholing measures in such a manner that they never

see the light of day, while the rule requiring report before a certain date avoids the last-minute rush which is common in many legislative bodies at the close of the session. The rule requiring a report on all measures of course lengthens the sessions, but it has the advantage of getting all business before the legislature in time to dispose of it in an orderly fashion. . . .

LOCAL AND SPECIAL LEGISLATION A MASSACHUSETTS WEAKNESS

The chief weakness of the Massachusetts legislative system is the mass of local and special legislation. About half of the actual output of the legislature, and even a larger proportion of the bills introduced, consists of special and local measures authorizing cities and towns to borrow beyond their debt limits; granting pensions to specified local employees; changing the names of city officers; creating public utility, charitable, and educational corporations; regulating the location of garages in a particular city; authorizing a specified charitable society to acquire property; authorizing a particular city to sell or lease certain land held by it for playground purposes; authorizing the registration of Mary Jones as a chiropodist without examination, etc. Then, too, there are numerous measures regulating the details of administration which should fall within the jurisdiction of some department or commission. In 1923 out of a total of 494 acts, there were 259 general acts and 235 special ones. The following table shows the number of special and general acts passed at each session since 1915:

Special and Local Legislation
1915 to 1923

Year	Number of General Acts	Number of Special Acts
1915	390	384
1916	302	367
1917	345	376
1918	295	189
1919	364	242
1920	330	299
1921	253	249
1922	281	265
1923	259	235

This means that a large part of the time of the legislature is taken up with proposals of purely local significance and with details of an administrative nature at the expense of measures of state-wide in-

terest and large importance. The legislature has attempted to reduce the burden somewhat through the introduction of a budget system, the requirement that all local measures be advertised in the locality affected, and the requirement that petitions for pensions must come from the proper local officials rather than from individuals. Yet the bulk of special legislation is still too great. The remedy would seem to be not in a constitutional prohibition of special legislation but in the adoption of a careful home-rule system for cities and the development of administrative machinery for passing upon requests for special and local legislation. . . .

80. OUR LEGISLATIVE MILLS[1]

CALIFORNIA—THE HOME OF THE SPLIT SESSION

By Victor J. West

There has recently been proposed in California a constitutional amendment providing that the legislature in its present form be abolished. It is proposed to substitute for it a "Council of State" numbering fifty members.

The suggestion to substitute a unicameral legislature for the bicameral system is no longer novel enough to be startling. Nor are the details of the California proposal particularly startling. The council would have complete legislative powers, subject of course to the limitations imposed by the constitution; it would meet biennially and remain in session continuously until its work were finished; each member would be paid $5,000 per year. The members would be elected by popular vote from fifty electoral districts of approximately equal population, but no county or city would have more than two representatives. The proposal, in spite of the fact that it is seriously offered, has occasioned only a temporary flicker of interest, for it is generally admitted that the possibility of adopting such an amendment is exceedingly remote.

THE DEMAND FOR A UNICAMERAL BODY

Nevertheless the mere fact that the resolution has been introduced must be regarded as symptomatic of a pathological condition, politically speaking, in the state legislature, which cannot be lightly passed over. The significance of the suggestion lies of course in the motives

[1] Reprinted from the *National Municipal Review,* July, 1923, by permission of the editor.

which prompted it. What is the defect which needs to be cured? It is the answer to this question which leads us to make further inquiry into the California situation.

It appears that a legislature of one house is not offered wholly or even mainly to correct the evils which are commonly and with reason attributed to the legislature of two houses. Of course there have been times in the history of the state when the bicameral principle defeated not only popular desires but also the ends of sound public policy and honest government. That has been true occasionally even during the past dozen years when both houses have been under the control of the so-called "progressive" elements in the state. And in the Forty-Fifth Session, which convened January 8, 1923, the two houses are not in close accord, one tending to work with the "administration," *i. e.,* the governor, and the other against it. But this is regarded by both factions as a temporary condition, and it probably is; in all probability one side or the other will control both branches in the next session. The key to the purpose in the present proposal is found not so much in the idea of a single chamber as in the provision that no county or city is to have more than two members in the Council of State, though the districts are to be approximately equal in size. The main problem, whether the legislature remains bicameral or not, is one of securing a proper basis of representation.

"ROTTEN BOROUGHS" HERE ALSO

The senate and assembly of the California legislature are composed respectively of forty and eighty members. For the purpose of electing these members the state is divided into forty senatorial districts and eighty assembly districts. The constitution provides that the senatorial and assembly districts respectively shall be as "nearly equal in population as may be, and composed of contiguous territory," and that no county shall be divided to form districts unless it contains sufficient population to make two districts and that no part of any county shall be united with any other county to form a district. It is further directed that "the legislature shall, at its first session after each census, adjust such districts and reapportion the representation so as to preserve them as near equal in population as may be." It is the question of reapportionment and its vexing attendant problems which has brought the composition of the legislature to the fore as a live issue.

Under the reapportionment law of 1911 various inequalities exist, in fact existed at the time the act was passed. For example, Santa Clara county constitutes two senatorial districts and two assembly

districts, though the former should be twice as large as the latter. On the other hand Fresno county constitutes one senatorial district and three assembly districts, though it was smaller in 1910 than Santa Clara county. With the changes in population recorded by the census of 1920 the discrepancies are more patent. For example, both Fresno and San Diego counties, each represented by one senator, are now more populous than Santa Clara county. A more obvious and more important contrast is that between Los Angeles and San Francisco counties. A fair apportionment would give the former eleven senators and twenty-two assemblymen instead of eight and fifteen respectively as at present, while San Francisco would be entitled to six senators instead of seven and twelve assemblymen instead of thirteen. Other southern counties would be entitled to similar gains at the expense of northern and interior counties. The only proposal for reapportionment which had the slightest chance of acceptance allotted to Los Angeles nine senators and nineteen assemblymen, and did not disturb the basis of representation at all in many counties. Yet, it was not reported out of Committee in the Senate for the reason that neither the San Francisco members nor those from the interior counties will stand for even that small an increase in the representation from Los Angeles. The only bill upon which a vote was taken still further favored Los Angeles county and was decisively defeated when reported in the assembly.

SAN FRANCISCO VERSUS LOS ANGELES

The reason for the failure of reapportionment bills in the recent session of the legislature may be found partly in the antagonism between the rural and suburban districts and the large cities, a familiar political phenomenon in many states. In California this line of division is crossed by another created by San Francisco's jealousy of the increasing population of Los Angeles and Alameda counties. In 1900 the population of San Francisco county was twice that of Los Angeles. By 1910 Los Angeles county had increased at the rate of over 200 per cent. and with a total of 504,131 had a population nearly 100,000 greater than San Francisco. In 1920 San Francisco county had increased to a little above the Los Angeles county figure for 1910, while its rival had attained a population of close to a million. Thus while Los Angeles county increased in the last decade at the rate of 85 per cent and Alameda county at the rate of 40 per cent (about the rate for the state as a whole), the increase in San Francisco was at the rate of but 21½ per cent. Small wonder that the citizens of the one-time metropolis of the Pacific Coast

are wounded in their pride and that its politicians struggle so determinedly to retain an inevitably diminishing political prestige.

The proposed council composed of fifty members with no more than two from any one county, if established, would doubtless put an end to the decennial squabble over reapportionment, for the counties likely to get two members are San Francisco, Los Angeles and possible Alameda, thirty of the other counties probably would get one member each, and the remaining twenty-five counties would be grouped in such a way as to provide the other fourteen districts. Increase in population of counties would have little effect on the desire for readjustment as long as no county, no matter how large, could have more than two members.

That this is a fair basis to representation of all the interests of the state would scarcely be admitted by many members of the legislature. The present system is illogical enough, for it provides two houses to be elected in the same way, though the constituencies are organized differently, and it attempts to secure representation in proportion to population while at the same time trying to preserve the county as an electoral unit. But with the legislature composed as it now is, it is too much to expect it to agree to limit the counties to two representatives in a single-chambered body. The representatives of the larger counties would combine to defeat such a proposal however much they may oppose each other in the attempts to get the lion's share of the representation under the present system. Nor would a proposal to adopt a scheme of proportional representation help matters. The only feasible plan would be the Hare system, and this would be regarded as impracticable unless the state were divided into six or eight districts. The problem of setting district boundaries recurs, and the respective representation of San Francisco and Los Angeles raises the same problem over again. Even if it were possible to make up acceptable groupings of counties into districts, or to treat the state as one big election district, it is scarcely probable that the present legislature would accept proportional representation. Obviously it would be expected that under an effective scheme of proportional representation Los Angeles county would secure a greater representation than San Francisco, and that the more populous counties generally would be represented in unduly greater proportion than the less populous.

NO HOPE THROUGH I. & R.

It would seem that the establishment of a just or even of an acceptable basis of representation in the California legislature offers

an insoluble problem unless the voters themselves should take a hand in the matter and by the initiative and referendum make the change directly. And even that possibility is rather remote. In the first place some agreement would have to be reached between leading citizens in the different sections of the state, a process even more difficult outside the legislature than in it. And the chances are that even if a plan of reapportionment were agreed upon one or more counter plans would be offered, with the result that none would be adopted. The inequalities in representation in the California legislature seem destined to continue for some years, and continuing will in the near future constitute an increasingly important cause of irritation, friction and distrust. The situation is unfavorable for the accomplishment of any unified program of constructive legislation.

PURPOSE OF SPLIT SESSION

The proposal to establish a council carries with it also another change with respect to the California legislature. The council is required to be in continuous session until it finishes its work. This is undoubtedly intended deliberately to abolish the practice inaugurated with the amendment adopted in 1911, which provides that a session of the legislature, except an extraordinary session, must at the expiration of thirty days after its commencement take a recess for not less than thirty days. Upon reassembling after the recess the legislature may remain in session as long as it sees fit, but an attempt is made to discourage the introduction of new bills.

This so-called "bifurcated session" was advocated by those who proposed it for four purposes. It was argued that, after a thirty-day session during which all the bills which were likely to be considered had been introduced, a thirty-day recess would be useful in giving the members time to consider and digest these measures and reach some conclusions as to their merits. It would also give the public a chance to get acquainted with the problems facing the legislature and to advise the members so that there might be some chance of a nearer approach between public opinion and legislative action. In the third place it was expected that the legislature might use the thirty-day recess for the purpose of conducting investigations either into the conduct of administrative branches of government or upon such public questions as were most pressing at the time. Finally it was expected that the provision for a recess would prevent the in-

troduction of measures late in the session when they might be rushed through without adequate consideration.

REASONABLY SUCCESSFUL

These expectations with respect to the divided session have generally been realized, though not all members use the recess for the purpose intended, nor does the public generally take enough interest in the work of the legislature to inform itself. Nevertheless the recess has been found very useful by chairmen of committees in affording them time for the analysis of bills and in the preparation of committee reports; and the fact that the clerical staff of the legislature is kept busy during the recess in publishing and mailing thousands of copies of the bills is indicative of some interest on the part of the public. During the session of 1921 the one month's recess was taken up with a debate over the proposed revision in the tax law which engaged the attention of the citizens from one end of the state to the other. It is not too much to say that this delay afforded the proponents of the measure an opportunity for securing a very wide discussion without which they would have had no chance whatever of securing its passage. It is quite possible that in every session there will be at least one measure of such transcendent importance that a thoroughgoing discussion will be highly desirable if not absolutely necessary. For that reason if for no other the thirty-day recess ought to be continued. Perhaps an equally important advantage will be the opportunity which the recess offers for carrying on legislative investigations. So far not a great deal of experience is available to judge of its significance from this point of view. During the session of 1923 several special committees conducted investigations on a variety of subjects. Most significant of these were the inquiries into the expenditure of money in election campaigns.

With the adoption of a new budget procedure it is possible that the bifurcated session will find another use. The governor is now required to submit the budget within the first thirty days. If he should introduce it at the beginning of the session, the first month may be taken up with the consideration of his proposals. It is possible that the budget might be disposed of before the recess, thus leaving the recess and the following session to take care of the work of legislation proper. This would be particularly useful if it turned out that the budget required changes in the tax system. The appropriations having been settled first, the exact kind of tax could be

determined upon after an investigation to be undertaken during the recess period.

Doubtless other uses for the recess period will be developed. At any rate the more important members of the legislature, those who take their responsibilities seriously, do not look with favor upon any measures to re-establish the continuous session. . . .

HOW THE LOBBY WORKS

An interesting feature of the California legislative practice is the way in which the so-called lobbyists carry on their operations. In most states the lobbyist, as the name implies, is usually not very conspicuous in the legislative chambers themselves, but in California both houses of the legislature have been somewhat too hospitable in admitting visitors to the floors of the chambers. The senate is a little more stringent than the assembly in this respect. Yet in both houses almost any visitor is permitted to enter the chamber, move freely up and down the aisles and confer with members even during the formal transaction of legislative business. Indeed it is no uncommon thing, in the assembly especially, for the seats of members to be occupied by persons who have no right to be in the chamber at all. The records of legislative proceedings in the state in the past fifteen years reveal many instances in which a fight over a particular measure was directed from the floor not by members but by lobbyists employed by conflicting interests in the state. From the desks of members and acting through committee chairman the lobbyists commanded the opposing forces as effectively as generals on the field of battle.

Some citizens have been moved to righteous indignation over the spectacle of servants of the "corporations" in command of a group of legislators, successfully opposing measures to restrain the alleged predatory activities of the railways, the power companies, and other public utilities in the state. Others have been equally indignant when the commander-in-chief has been the paid representative of the labor unions. Nevertheless there is much to be said in favor of the California practice as compared with the way in which the same sort of thing has been done in Pennsylvania, New Jersey, Illinois, in times past. At any rate the representatives of the press have no difficulty in finding out just who is responsible for influencing the actions of the various members. Doubtless the publicity which the California methods of lobbying produce offsets to a very great degree the bad features of lobbying in general.

The California legislature is by no means perfect. Its failure to adopt a just apportionment of representation is a standing disgrace. Some aspects of its procedure are hardly to be commended. It has to be curbed by the "referendum" and its work supplemented by the "initiative." But in spite of its faults, he would be a bold prophet who would predict the establishment in its place of unicameral body within the next generation.

81. OUR LEGISLATIVE MILLS

THE LEGISLATIVE PROCESS IN ILLINOIS[1]

By Leonard D. White

Many features of the general assembly of Illinois suggest themselves for discussion, from among which has been selected an account of the law-making process. The extraordinary congestion of legislation at the end of the session which is characteristic of Illinois is the result of a complex of causes, the complete analysis of which has never been undertaken.[2] This study is a preliminary attempt to illustrate the "end of the session" rush and to point out some of the reasons which appear to contribute to it.

Although cold figures are quite inadequate to picture the closing scenes of a six months' session in which a weary legislature holds continuous meetings for fifty or sixty hours, and records itself in a monotonous and apparently endless series of roll calls on bills read by title by an exhausted clerk, while some members sleep in nearby corridors in order to relieve their fellow legislators during the night, it may nevertheless be proper to begin an analysis of causes by a statistical picture of the result. The following tables (which may be skipped by the judicious reader) indicate the progress made by the general assembly on twenty specified dates, usually at intervals of one week.

In Table I the steadily mounting figures from left to right indicate numerically the progress made from week to week at each stage of precedure. Thus the figures in stage one show the steady introduction of bills and their reference to committee, in stage six the receipt of a bill by one house from the other, in stage ten final passage by the second house.

[1] Reprinted from the *National Municipal Review,* December, 1923, by permission of the editor.

[2] See, however, the following: Dodd and Dodd, *Government in Illinois,* pp. 131–149; Bogart and Mathews, *The Modern Commonwealth.*

TABLE I

NUMBER OF BILLS HAVING PASSED THROUGH CERTAIN STAGES AT CERTAIN DATES, ILLINOIS GENERAL ASSEMBLY, 1923

Digest Number	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
Date	1-27	2-3	2-10	2-17	2-24	3-10	3-17	3-25	3-31	4-7	4-14	4-21	4-28	5-5	5-12	5-19	5-26	6-2	6-9	6-20
1. Introduction	105	176	229	295	376	487	563	681	793	836	952	1,045	1,110	1,166	1,228	1,320	1,366	1,388	1,398	1,404
2. Committee Report	5	6	8	21	35	72	101	143	209	219	297	357*	440	533	630	735	804	871	927	1,403
3. First Reading	5	6	7	12	30	48	87	105	163	178	231	288	371	438	527	608	664	705	759	777
4. Second Reading	3	4	5	7	18	33	64	81	113	132	187	226	269	314	358	429	475	579	657	686
5. Third Reading	..	3	3	6	7	13	14	37	52	69	102	126	157	181	200	246	261	341	426	526
6. Second House Introduction	..	3	3	6	7	13	14	29	47	51	74	110	133	165	189	235	248	304	371	483
7. Committee Report	..	1	3	5	6	7	13	14	24	28	41	55	86	112	150	175	203	231	318	476
8. First Reading	..	1	3	3	5	5	8	9	16	17	28	31	53	78	112	140	150	180	247	436
9. Second Reading	..	1	1	2	4	5	7	8	11	11	21	28	41	50	79	111	123	146	180	419
10. Third Reading	..	..	..	1	3	3	5	6	8	10	14	20	29	33	34	57	62	71	85	380
11. Governor's Action	..	..	..	..	..	..	3	3	6	7	10	10	21	29	32	41	51	61	62	358

Note on Preparation of Table. The LEGISLATIVE SYNOPSIS AND DIGEST, of which twenty numbers appeared during the last session, gives week by week the status of each bill. The normal stages through which a bill passes are eleven.

1. Introduction and reference to committee.
2. Committee Report.
3. First reading.
4. Second reading.
5. Third reading and passage.
6. Introduction in second house and reference to committee.
7. Committee report.
8. First reading.
9. Second reading.
10. Third reading and final passage.
11. Appproval or veto by the governor.

These stages are not entirely inclusive; occasionally a bill is referred to two committees, sometimes recalled to an earlier stage, sometimes goes to conference: but substantially the whole work of the Assembly can be compressed into these stages.

This table is made up by analysis of each Digest.

TABLE II

NUMBER OF BILLS HANDLED DURING SPECIFIC PERIODS AT DIFFERENT STAGES, ILLINOIS GENERAL ASSEMBLY, 1923

Digest Number	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	
Date	1-27	2-3	2-10	2-17	2-24	3-10	3-17	3-25	3-31	4-7	4-14	4-21	4-28	5-5	5-12	5-19	5-26	6-2	6-9	6-20	Totals
1. Introduction	105	71	53	66	81	111	76	118	112	43	116	93	65	56	62	92	46	22	10	6	1,404
2. Committee Report	5	1	2	13	14	37	29	42	66	10	78	60	83	93	97	95	79	67	56	476	1,403
3. First Reading	5	1	1	5	18	18	39	18	58	15	53	57	83	67	89	81	56	41	54	18	777
4. Second Reading	3	1	1	2	11	15	31	17	32	19	55	39	43	45	44	71	46	104	78	29	686
5. Third Reading	..	3	0	3	1	6	1	23	15	17	33	24	31	24	19	46	15	80	85	100	526
6. Second House Introduction	..	3	0	3	1	6	1	15	18	4	23	36	23	32	24	46	13	56	67	112	483
7. Committee Report	..	1	2	2	1	1	6	1	10	4	13	14	31	26	38	25	28	28	87	158	476
8. First Reading	..	1	2	0	2	0	3	1	7	1	11	3	22	25	34	28	10	30	67	189	436
9. Second Reading	..	1	0	1	2	1	2	1	3	0	10	7	13	9	29	32	12	23	34	239	419
10. Third Reading	..	..	..	1	2	0	2	1	2	2	4	6	9	4	1	23	5	9	14	295	380
11. Governor's Action	..	..	..	..	..	..	3	0	3	1	3	0	11	8	3	9	10	10	1	296	358
Totals	118	83	61	95	133	195	193	237	326	116	399	339	414	389	440	548	320	470	553	1,918	7,348

RATE OF PROGRESS

In order to bring out more clearly the rate of progress, attention should be turned to Table II. This table is made up by subtracting digest one from digest two, stage by stage, and gives, therefore, the exact number of bills moved along at each stage during any specified period. Thus during the interval covered by the second digest, 71 bills were introduced, one was reported from committee, one was given first reading, and so on. The vertical totals give week by week the number of moves made all along the line; thus during the interval covered by the ninth digest, 326 moves were made, while during the interval covered by the third digest only 61 moves were made. The horizontal totals give the total number of bills which passed through any given stage; thus 1,404 bills were introduced in the two houses, 380 went through the stage of final reading in the second house, of which 358 were passed and sent to the governor for approval or disapproval.

WHAT THE TABLES SHOW

Certain facts appear from consideration of these tables.

1. The peak loads stage by stage are approximately

Stage 1	March 20–30
Stage 2–3	May 7–19
Stage 4	May 14–June 9
Stage 5–6	May 20–June 20
Stage 7–10	June 11–June 20
Stage 11	June 20–June 30

This indicates a steady accumulation of business toward the end of the session.

2. Bills were introduced without any appreciable slackening until May 19, or throughout five of the six months of the session.

3. Each house was primarily occupied with its own bills until June 5, the twenty-second week of the session. No substantial number of bills passed from one house to the other until the week ending April 14, following which from ten to twenty bills were received by each house from the other.

4. No substantial number of bills passed the stage of second reading in the second house (stage 9) until the week ending May 12, the nineteenth week of the session.

5. The latter stages of the legislative process were very seriously

crowded into nine legislative days commencing June 11. Of the bills that reached the second reading stage (stage 9), 239 were dealt with from June 11 to June 20, or 56 per cent; of 380 bills that reached third reading stage (stage 10), 295 were dealt with from June 11, or 77 per cent; and of 358 bills presented to the governor, 296 were dealt with from June 11, or 82 per cent. As the result of the work of the first 16 weeks, ten bills were sent to the governor; during the last nine days 296 bills were sent to him. From June 11 to June 20, a period of nine working days, 476 bills were killed, 100 bills were given final passage in the house of their origin, and 296 bills were sent to the governor. Forty per cent of the total movement of legislation came in the month of June.

6. The monthly record of final passage of legislation (stage 10) by the two houses throws further light on the same situation.

Month	*Bills passed*
February	3
March	5
April	21
May	33
June	318

This table indicates that from January to June, 62 bills were enacted, while from June 1 to June 20, 318 bills went through the assembly.

7. The daily record of final passage emphasizes the same point.

BILLS

June 12	10
13	4
14	28
15	62
16	10
18	39
19	133

The general conclusions to be drawn from this evidence, which is typical of Illinois, is that on the whole the Illinois general assembly does the work of general consideration of legislation in a leisurely fashion during an extended period running from January to about the first of June; whereupon it enters upon a period of making decisions in rapid succession, operating under considerable pressure of time and usually finally forced to enact legislation by wholesale with only the slightest regard for due consideration and sometimes with only a very hazy notion of what actually has taken place. During

the notorious end of the session rush of 1921 it was charged without contradiction that over a hundred items which had never been considered by either house before were inserted by a conference committee in a general appropriation act. By rule adopted in 1923, a repetition of this scandal is made impossible. . . .

GENERAL RESULTS

Some of the results of the legislative process in Illinois may be suggested in conclusion. Omitting to speak of the considerable physical and mental strain which members impose upon themselves and the undignified and sometimes unworthy scenes which accompany the final hours of the session, we may turn attention to some of the more general results. The congestion of legislation described above necessarily leads to lack of proper consideration of measures some of which make their first appearance only in the last week or ten days; civic organizations, the public, have no opportunity to learn what is transpiring and consequently are unable to make their voices heard. There develops an admirable opportunity for deception of the members themselves, who are frequently seen rushing about to find someone who will tell them how to vote. It is said that not more than three persons really knew what was in the Chicago charter enacted by the Illinois Assembly of 1907.

The situation lends itself to manipulation. It likewise lends itself to control by the old-timer, who knows the parliamentary game, who keeps his head and who senses the feeling of the assembly in a way quite impossible to the "green" member. At this time are discovered the possibilities of the conference committee whose report, delivered at the last moment, is never understood by a majority of those voting on it.

The governor's desk is swamped with bills awaiting his signature. Governor Small had over two hundred to deal with in the last two weeks of the recent session, requiring him to give consideration to nearly twenty per day. In Illinois the new legislation normally takes effect on July first; the great bulk of it is approved by the governor in the week immediately preceding; and the citizen finds himself in the awkward situation of being subject to the penalties of a statute the publication of which is still a matter of two months in the future.

Beard (4th Ed.), pp. 592–621.
Kimball, *State and Municipal Government*, pp. 207–224.
Ogg and Ray, (2nd Ed.), pp. 663–683.
Dodd, *State Government*, pp. 188–232.

XXI

THE GOVERNOR

Under the first state constitutions the governor occupied a position subordinate to the legislature. The experience of the colonial period made the framers of state constitutions suspicious of executives, and they were determined to prevent executive tryanny. The legislature was confident of its ability and would not allow the executive to limit its powers. The office of governor in the American states has developed under these restrictions and in spite of the limited powers granted by the first state constitutions. Short terms were provided, and veto, appointing, and administrative powers were withheld. Step by step the office of governor has gained power at the expense of the legislature. In 1918 the last one-year term provision was abolished. The veto has been granted until all governors save one now have that power. Appointing authority and administrative control have been extended by the short ballot and plans for administrative consolidation. More recently the governor has gained another power which was denied him in the earlier days when the members of the legislature were close to the people and he was relatively unknown; that is, his control over public opinion. Successful governors have caught this idea and have made it effective. The message, the radio address, and similar means of communication have brought the governor closer to the voter, and support has come to him regardless of party affiliations. He controls his legislature by the force of the public opinion which he creates. The governor of the future must be more adept at this if he wishes to gain influence and prestige.

The governor's office has been enlarged and the legislature has been obscured, until the executive now dominates. State-wide ideas are important; district ideas are oftentimes petty. We are confronted with the spectacle of the governor controlling the state policy and the legislature devoting its energy to the solution of district problems. The governor is recovering his former place of authority in state government.

82. THE EXECUTIVE IN THE MODEL STATE CONSTITUTION[1]

By John A. Fairlie

In American state governments, the executive has come to be organized in a fashion which almost defies analysis, and offers a strik-

[1] Reprinted from the *National Municipal Review,* April, 1921, by permission of the editor.

ing contrast to the executive organization in the national government and in that of all other countries, and also to that in many American cities.

In most European and other foreign countries, there is a single titular executive, with extensive formal powers. But in the operation of the government the executive powers are exercised by a cabinet of administrative officials, acting collectively, but generally with a prime minister who has a large and often a dominating influence. In Switzerland, the executive council is vested with the executive powers, and the president of the confederation is merely the chairman of the council.

The United States constitution vests the executive power in the President, with a large field of personal authority and control, limited, however, by the power of the senate over appointments and treaties; and there has also developed an extra-legal advisory cabinet composed of the heads of the principal executive departments. The internal organization of these departments and the recent development of many boards and commissions outside of the executive departments weakens the President's effective control; but the constitutional principle of concentrated responsibility is clearly established.

American municipal government for many years exhibited the same characteristics of executive disorganization which still characterize the state executive; and these still persist to a considerable degree in many cities. But to a large extent municipal administration is now more effectively organized, either under the mayor or a city manager, or under a small commission of from three to seven members.

But the state executive remains in the main a loose aggregation of unrelated offices, under no effective direction or control. The arrangements in force represent no consistent or coherent system; but are the haphazard results of more than a century of unconscious adaptation, resulting from a variety of conflicting ideals and principles, which have never been correlated. They have sometimes been referred to as a system of distributed executive powers; but no serious student of political organization has ever found any definite plan in the methods in force, or has undertaken to uphold any such plan of distribution. It represents neither the single executive, nor the collective executive, nor any intermediate type.

The factors which explain the present situation may be briefly summarized: In the first place, opposition to the appointed colonial governors led to distrust of concentrated executive power; and the early state constitutions weakened the executive and placed it largely under the control of the legislature. But the defects of legislative control and the increasing tide of democracy led to the direct popular election

of most of the older executive offices. Since about 1850, there has been a steady development of the governor's power, with the development of state administration; but the older offices remain elective; while in most states the multitude and variety of appointive officials and boards and the lack of any systematic organization prevents the governor from establishing an effective control even over the appointive officials.

In a few states, beginning with Illinois in 1917, there has recently been established a more systematic organization of state administration, covering the appointive positions under the governor. But these changes have been made by statute; and have not been able to include the elective state officials provided for in the state constitution. Any thorough reorganization of the state executive, therefore, requires important changes in the constitutional provisions relating to that branch of the government.

THE GOVERNOR AND THE LEGISLATURE

The provisions of the "Model State Constitution" relating to the executive are based on the principle of concentrated executive power, as in the Constitution of the United States. The executive power of the state is vested in a governor, to be elected by popular vote and to hold office for a term of four years. He is to appoint and may remove the heads of all executive departments, and all other officers and employes in the executive service are to be appointed by the governor or by the heads of executive departments as may be provided by law.

It has been proposed by some that the separation of executive and legislative powers should be entirely abandoned; and that the governor should be elected by and directly responsible to the legislature. This would be in accordance with the cabinet system of European countries, and with the method of choosing the executive council in Switzerland, and also with the city-manager plan of municipal government. But, while there may be much to be said in favor of such a plan, it has seemed to the committee of the National Municipal League that for some time to come such a reversal of established American methods will not be approved. The governor has become much more than a ministerial officer to execute laws and policies. He is expected to develop and carry out plans of administrative policy, and to take the lead in proposing legislative measures. His election by the state at large gives him a broader outlook than many of the members of the legislature, who may be guided too much by the local views of their districts. In fact election returns indicate that there

is a larger popular interest in the election of governor than in the election of members of the legislature. It, therefore, seems best to retain the direct election of the governor, as a feature of popular control of the government which is now effective.

At the same time, it is important to recognize that the governor and the legislature must work together if the state government is to operate harmoniously and successfully. The two should not be considered as occupying water-tight compartments with no direct connection except by formal documents. It is therefore proposed that: "The governor and heads of departments shall be entitled to seats in the legislature, may introduce bills therein and take part in the discussion of measures, but shall have no vote."

Such practices have frequently been urged for the President and members of his cabinet in congress, among others by President Taft. A constitutional provision would mark the recognition and endorsement of existing practices such as that of addresses to congress and the state legislatures by the President and governors, and the active and necessary part taken by department heads, and sometimes by other officials in the formulation and advocacy of legislative measures. By the more open and public methods of communication, coöperation and harmony between the legislature and the executive should be made more easy.

It is more specifically provided that the governor shall submit at each regular session of the legislature a budget of proposed expenditures and anticipated revenues; and shall also introduce a general appropriation bill providing for all the proposed expenditures as set forth in the budget. Other features of the budget provisions will be discussed later in further articles on the model state constitution.

The veto power of the governor is retained, as in most of the existing state constitutions, subject to a two-thirds vote of the legislature; and the governor may also disapprove or reduce items in appropriations, subject also to the same two-thirds vote of the legislature.

A novel provision, to avoid dead-locks between the governor and the legislature, is that authorizing a referendum of the people on measures vetoed by the governor, and (by order of the governor) on bills which fail of passage if at least one third of the members vote in their favor. It is suggested that this procedure for securing a direct popular vote on such matters at issue may prove more satisfactory than the alternatives under the European cabinet system of the resignation of the cabinet or the dissolution of the legislature and a new general election.

LIEUTENANT-GOVERNOR ABOLISHED

The four year term for the governor corresponds to that of the President of the United States and to that of the governor in nearly half of the states. It is believed that such a period is needed to give a governor opportunity to develop and carry out his policies, while the biennial election of the legislature will make possible an effective public expression of disapproval of particular measures without leading to a general overturn of the administration.

Provisions have not been included in the sections drafted as to the qualifications for the governor, nor as to the usual powers of the governor, to exercise executive power, to see that the laws are enforced, to act as commander in chief of the state military and naval forces, to require information from executive officers, and to exercise the power of pardon.

Such provisions are substantially similar in the state constitutions, and the variations of detail are of little importance. No changes of principle have been proposed with reference to these matters; and the usual provisions may be continued. The authority of the governor to supervise and direct other executive officers may, however, be made more definite. Nor have provisions as to impeachment and other methods of removal been as yet prepared by the committee. These may be included in later reports of its work.

In other matters, however, omissions of provisions commonly found in state constitutions have been for the definite purpose of carrying out the general principles of executive organization which are recommended. Thus, no provision is made for the election of a lieutenant-governor; but in case of vacancy or disability of the governor the presiding officer of the legislature will act as governor for the remainder of the term. The election of an officer whose principal purpose is to fill a vacancy is an anomalous procedure, which has not been markedly successful, and the states which now have no lieutenant-governor do not seem to have suffered any serious results. Lieutenant-governors and vice-presidents of the United States have in many cases represented a different element or policy from the governor (president), and more continuity may be expected from an officer representing the majority in the legislature.

GOVERNOR TO APPOINT ALL DEPARTMENT HEADS

The appointment of all executive officers is proposed as an application of the short ballot principle, as well as the principle of concentrated executive authority. The election of a number of execu-

tive officers in addition to the governor fails to secure the results expected of increasing popular control; but on the contrary is today one of the most serious obstacles to popular control of the government. The long list of elective officers and the longer list of candidates impose an impossible task on the voter, beyond the capacity of the most intelligent who do not make a business of politics. The mechanical task of voting has been reduced by the party column and other devices on the ballot; but the results indicate clearly that the great mass of voters do not care to discriminate between candidates for the less important offices and vote on the basis of a party ticket. In effect the voters are disfranchised because they are required to vote too much. A responsible system of appointment should make more effective public opinion as registered in the election of the governor.

Moreover the duties of the subordinate officers now elective are not political, but executive or administrative in character; and call for qualifications of technical ability and experience which cannot well be determined by popular election. At least some of the officials now elected are less important than some of the positions now filled by appointment; and there is no logical basis of distinction between the appointive and elective places.

Where the elective state officers are chosen at the same time on the same party ticket, some degree of harmony may be expected, on the basis of political principles or of party organization. But active cooperation between such officials is seldom found. They are apt to represent different, and sometimes antagonistic elements in the party; and even where there is no open hostility each elective officer is likely to feel and assert at times his independence of the governor. In some states elective state officers are ex-officio members of certain state boards; but these have to do with limited and specific functions, and fall far short of constituting an executive council of general authority.

While no general principles have been stated on which to distinguish the officials now elective as a group from those appointed, for some positions there have been special opposition to transferring them from the elective to the appointive class. The election or appointment of the attorney-general was discussed at the constitutional conventions in New York state in 1867 and 1915. It was argued that the functions of this officer were to some degree political in nature. But it would seem that his duties to aid in the enforcement of the laws and to give legal advice to other state officers are essentially part of the executive power, and that these duties should be exercised by one in agreement with the chief executive who is constitutionally responsible for the execution of the laws. An attorney-

general hostile to the governor could in large measure weaken his authority even over the officials he appoints. Indeed this situation has been recognized in New York, when by chance an attorney-general has been elected of another political party from the governor, the latter was authorized to employ special counsel. President Taft spoke before the committee of the New York convention in favor of the appointment of the attorney-general as follows:

"Well, if you are going to have a lot of independent officers, who are running their own boats, paddling their own canoes, without respect to the head of the state, then of course you want a judicial officer to decide between them. But if you are running a government on the basis of a head man being responsible for what is done, and for the work being done in the most effective way, then what you want is a counsel. When you consult a lawyer, you don't consult a judge. You consult a man who is with you, seeking to help you carry out the lawful purposes that you have. Therefore he ought to be your appointee. You select him. Now the chief executive is given an attorney-general to advise and represent him in all legal matters. I don't see why he shouldn't be appointed. It would be most awkward if he was not, in Washington, I can tell you that." [2]

AUDITOR CHOSEN BY THE LEGISLATURE

The opinion is even more widely held that the state auditor or comptroller should be independent of the governor, on the ground that the duties of this officer are to act as a check on the expenditure of executive officials and keep them within the limits of the appropriations. This view also prevails in a few states where the auditor or comptroller is not elected, but is chosen by the legislature. On the other hand, in the United States national government the comptroller of the treasury and the auditors are appointed by the President, and are classed within the department of the treasury; and a similar arrangement is provided in a number of large cities, as in Chicago and Detroit.

If the auditor is to be independent of the governor, the practice in most of the states of electing this official at the same time as the governor is unsatisfactory. An auditor so elected is likely to be of the same party as the governor, and thus not to act as a wholly independent officer. Greater independence would be secured if the auditor were chosen by the legislature, or, if elected by popular vote, he should be elected at a different time than the governor.

But the practice of a supposedly independent officer who controls

[2] *New York Constitution Convention Documents* No. 11 (1915).

disbursements has been due to a confusion between the functions of accounting and auditing in American governments. The auditor or comptroller now acts to some extent both as accountant and auditor; but in fact there has been neither an adequate system of accounting, nor any effective independent audit of the accounts kept. In European governments, and in business corporations in the United States, the accounting service and the control over disbursements is a branch of the executive administration; while there is a subsequent audit of accounts at regular intervals by an outside agency. Thus in Great Britain the accounts are kept and current control of disbursements is exercised by the treasury; and the work of the comptroller and auditor-general is to make a critical examination of the completed financial accounts, methods and reports at the end of each fiscal year.

In some American states and cities, the need for a central executive control over expenditures and accounts has been recognized, to some extent, by such officers as the administrative auditor in Illinois or the commissioners of accounts in New York city, as agents of the governor or mayor, in addition to the popularly elected auditor or comptroller. But this plan, if adequately carried out, involves a duplicate system of accounts kept both by the executive department and also by the auditor.

The same confusion of thought is shown in the recent proposal to make the United States comptroller of the treasury legally independent of the executive. This would make it necessary to establish a duplicate accounting system in the treasury department, unless the functions of the comptroller are strictly limited to that of auditing the accounts and reports.

It is the opinion of the National Municipal League Committee on State Government that there should be a central accounting service, with control over disbursements, in the executive branch of the state government, as one division of a department of finance. It should, however, be clearly made the duty of the legislature to provide for a regular independent audit of the financial accounts and reports after each fiscal period, in place of the spasmodic investigations which occasionally take place, based largely on political considerations.

THE EXECUTIVE DEPARTMENTS

No constitutional provisions have been proposed for a definite and detailed plan of executive departments. In this respect the constitution of the United States has been followed. This does not mean

that the need for a thorough reorganization of the administrative arrangements in the states is not recognized. It is based on the belief that the details of administrative organization should not be stereotyped in the state constitution, but should remain flexible, to be adjusted from time to time by legislation, to meet the needs of a developing political system.

The provisions in the present state constitutions for executive and administrative officers, which for the most part are survivals from the constitutions of the middle of the nineteenth century, have clearly proven inadequate for present conditions. Indeed they now form serious obstacles to the establishment of an effective administrative system. Proposed constitutional provisions for a more systematic arrangement, such as those presented in New York state, have been compromises, making only partial steps towards a satisfactory system; and there is danger that such partial reforms, imbedded in the state constitution, will prove even more stubborn obstacles to further changes. Even the shorter provisions recently adopted in Massachusetts, providing for not more than twenty departments, give sanction to more than should be needed; and the legislation adopted under this provision falls far short of an effective organization.

It may be noted that most of the services of the United States national government, which greatly exceed those of any state, are organized in ten executive departments. And the still greater field of central administration in France is organized under a dozen ministries. There seems to be no need for any more in any American state; though it may be difficult to secure a reduction to this point in the near future.

The most comprehensive and successful plans of state administrative reorganization thus far adopted, such as those in Illinois, Nebraska and Idaho, have been accomplished by statutory legislation; and these might have gone further had it not been for the existing constitutional provisions. The policy followed has, therefore, been to omit from the proposed constitution all provisions relating to executive and administrative officers other than the governor.

The League's committee has also approved a constitutional provision for the merit system in the administrative service, substantially similar to the provisions in the New York and Ohio constitutions, requiring competitive examinations so far as practicable for appointments. More definite provisions as to the organization of the civil service authority and the application of the constitutional principle should be made by legislation.

83. THE ITEM VETO AND STATE BUDGET REFORM[1]

By Rodger H. Wells

The movement for budget reform has now reached a point where every state, except Missouri,[2] has enacted some kind of budget legislation. An excellent historical approach to this reform lies in a study of the governor's veto power, particularly his authority to veto items of appropriation. Accordingly, the following article outlines the development of the item veto[3] and indicates its present relation to the budgetary provisions of the states.

The item veto was first established in the Confederate Constitution of 1861.[4] This step was taken for two reasons.[5] In the first place, the ordinary veto had proved inadequate when applied to appropriation bills. Since such measures had to be considered as a whole, improper expenditures could not be separated from those which were necessary, nor was it usually feasible to negative an entire appropriation act because of a few objectionable items. Secondly, the item veto was introduced as a part of a plan to adapt English budget principles to American conditions in order to secure greater harmony between the executive and the legislature. The leaders of the South greatly admired the English governmental system but they were not blind imitators, for they did not wish to set up a parliamentary type of government in the Confederate States. Hence, it was provided that proposals for expenditure should originate with the President

[1] Reprinted from the *American Political Science Review,* November, 1924, by permission of the editor.

[2] The Missouri Budget act of 1921 was defeated on a referendum vote in 1922; the budget amendment, proposed by the recent constitutional convention, was rejected by the people in February, 1924.

[3] Useful discussions of the item veto are contained in the following: John A. Fairlie, "The Veto Power of the State Governor," *Am. Pol. Science Rev.* Vol. XI, No. 3 (1917); N. H. Debel, *The Veto Power of the Governor of Illinois* (Urbana, 1917); K. E. Carlson, *The Exercise of the Veto Power in Nebraska* (Lincoln, 1917).

[4] In A. N. Holcombe's *State Government,* it is stated (pp. 112, 113) that New Jersey adopted the item veto in 1844. This is an error due to a misleading caption in F. N. Thorpe's *Federal and State Constitutions.* The item veto in New Jersey dates from 1875.

[5] Robert H. Smith (the man who proposed the item veto in the constitutional convention of the Confederacy), *Address to the Citizens of Alabama on the Constitution and Laws of the Confederate States of America,* pp. 7–11 (Mobile, 1861).

while Congress, with two unimportant exceptions, was forbidden to initiate appropriations unless they were authorized by a two-thirds vote of both houses. To defend his budget estimates, the President was given the item veto. These provisions were intended to be a compromise between English financial procedure and prevailing American practice. Thus, at the outset, the item veto was associated with the idea of an executive budget. The English analogy further appears in that Congress was empowered to grant seats in either house to cabinet members with the privilege of speaking on measures concerning their departments.

Interesting as these new features were, the war and the collapse of the Confederacy prevented them from being tested under normal conditions; in fact, the item negative was never exercised by President Davis. When peace was restored, the item veto was not lost sight of, but was copied by Georgia (1865) and Texas (1866). It has since spread rapidly so that it now exists in all but eleven states,—Maine, New Hampshire, Vermont, Connecticut,[6] Rhode Island, Indiana, Iowa, Wisconsin, Nevada, Tennessee, and North Carolina. As stated before, the Confederate item veto was adopted, not only because the ordinary veto was inadequate, but also because it was intended to function as a part of the executive budget machinery. However, when the new device was introduced in the states, the second reason was largely overlooked and the other parts of the machinery were omitted. Originally, the primary purpose of the item negative in the states was to prevent improper or unconstitutional appropriations rather than to restrain expenditures which were merely excessive in amount.[7] This purpose has, in the main, been successfully accomplished. But in time, owing to the increasing cost of government and the extravagant habits of legislatures, the original intent of the item veto has become subordinated to a demand that the governor extensively use his veto authority as a means of compelling the state to live within its income.[8] Under such circumstances, the item veto began to disclose serious defects the nature of which will be indicated later.

The growing realization of these defects led to reforms along several lines, the most important of which was the state budget movement. Earlier and quite apart from any budgetary legislation, the scope of the item veto was extended in Pennsylvania. Starting in 1885, the governors of that state, without specific constitutional authority, began to reduce items of appropriation with a view to

[6] An item veto amendment is now pending in Connecticut.

[7] *Debates,* New York Constitutional Convention of 1867–68, pp. 1109–1126.

[8] See Debel, *op. cit.,* pp. 120–125, for the experience of Illinois on this point.

checking improper itemization by the legislature. Thus, it was no longer possible for that body to prevent the use of the item negative by putting necessary and unnecessary expenditures together in lump-sum items. In 1901, this practice was upheld by the state supreme court [9] and thenceforth was employed on a large scale. From 1901 to 1924, the average number of items reduced per session was 121 while the average number vetoed *in toto* was only 53.[10] Nor do these figures tell the whole story. Over 40 per cent of the output of the Pennsylvania legislature consists of appropriation acts, most of which are special or local in character. The decision of 1901 applied directly to only one of the 200 items in the general appropriation bill, but the language of the court was broad enough to imply a similar power of reducing special appropriation measures, each authorizing a single expenditure for one particular object. The governors immediately took advantage of the implication. Besides the items referred to above, the average number of single-item appropriation bills scaled down at each session was 115. For example, in 1913, 516 appropriation bills were enacted by the legislature; of these 110 were negatived in their entirety, 147 single-item bills were reduced, 410 items in 139 measures were disapproved or reduced, while the remaining 120 acts were signed by the governor without change. The aggregate amount vetoed was over $21,000,000 or 23 per cent of the total appropriated by the legislature. Furthermore, at each session, most of the appropriation measures were passed just before adjournment, and were sent to the governor for his action in the thirty-day period following the close of the session. Thus, from 1901 to 1924, of the total number of appropriation bills and items which the governors disapproved or reduced, 98 per cent were disapproved or reduced in the thirty-day period. The few bills and items which received executive action before adjournment were mainly emergency and deficiency acts. Since a veto after adjournment is not subject to legislative review, it may be affirmed that, under the conditions prevailing up to the passage of the budget act of 1923, the governor of Pennsylvania had an absolute negative over the expenditures of the state. The

[9] Commonwealth v. Barnett, 199 Pa. 161. Briefly, the facts of this case were as follows: In the general appropriation bill of 1899, there was one item appropriating $11,000,000 to the public schools of the state. The governor vetoed $1,000,000 of this item and approved the remaining $10,000,000. In sanctioning the reduction, the court was compelled to place a strained interpretation upon the item veto provision in the state constitution. Apparently, the judge feared that a contrary decision would invalidate the entire amount; they were also influenced by the argument from prescription since the practice had been used for fifteen years without being challenged in the courts.

[10] *Governor's Vetoes; Laws,* 1901–1923.

legislature appropriated recklessly and went home, leaving the executive to make ends meet by whatever reductions he thought proper.

As previously stated, the Pennsylvania plan was evolved prior to any budget reform. Ten or fifteen years ago, it had considerable popularity and many governors and publicists advocated the enlargement of the item veto so as to permit the reduction of items. Moreover, in about a dozen states, besides Pennsylvania, the governors attempted to reduce items or to disapprove parts of items. Their efforts, however, were not very successful because the courts, in the absence of specific constitutional authority, were inclined to hold such action void,[11] and because the item veto, both in its original and modified forms, was rather generally opposed by the new school of budget reformers which was developing about the same time.

It now remains to speak of the state budget movement and of its effect upon the veto power. In lieu of Pennsylvania's modified item negative, the budget advocates presented a counter proposal which found complete expression in the New York budget provision of 1915 (rejected by the voters) and in the Maryland budget amendment of 1916. According to the budget reformers, the veto and the item veto as applied to appropriation bills were illogical and ineffective. They were illogical because they reversed the relation which should exist between the governor and the legislature. Instead of the executive initiating appropriations subject to the revision of the legislative department, which was supposed to control the purse, the oppo-

[11] State v. Holder, 76 Miss. 158 (1898); Regents of the University v. Trapp, 28 Okla. 83 (1911); Fulmore v. Lane, 104 Tex. 499 (1911); State v. Forsyth, 21 Wyo. 359 (1913); Nowell v. Harrington, 122 Md. 487 (1914); Fergus v. Russel, 270 Ill. 304 (1915); Fairfield v. Foster, 213 Pac. 319 (Ariz. 1923); Peebly v. Childers, 217 Pac. 1049 (Okla. 1923); Wood v. Riley, 219 Pac. 966 (Calif. 1923); Strong v. People, 220 Pac. 999 (Colo. 1923); Mills v. Porter, 222 Pac. 428 (Mont. 1924).

The above cases either deny the power to reduce items, or contain *obiter dicta* denying that power, or evade passing upon the question. Thus, they differ from the affirmative decision of Commonwealth v. Barnett. A further difference lies in the fact that the Pennsylvania case involved a very large amount in a single item while the other cases involved minor reductions in relatively small items. In Colorado, items were first reduced in 1913, but the validity of this action was not judicially determined until 1923. In Strong v. People, the Colorado supreme court specifically rejected the prescriptive argument which had been successfully used in Commonwealth v. Barnett.

The fundamental question in many of these cases is "What constitutes an item?" Such an issue arises when the legislature appropriates a single item and then seeks to apportion that item either tentatively or directly into further divisions. This question particularly engaged the attention of the court in Regents of the University v. Trapp, and Peebly v. Childers. See also Martens v. Brady, 264 Ill. 178 (1914); People v. Brady, 277 Ill. 124 (1917); and Mitchell v. Lowden, 288 Ill. 327 (1919).

site situation prevailed. The veto and the item veto were ineffective because responsibility for expenditures was divided. They encouraged extravagance on the part of the law-making branch so that it came to rely upon the governor to make ends meet. Moreover, it was not enough for the executive merely to negative large sums. What was often needed was a general reduction all along the line, and it was not easy to secure a balanced outlay simply by disapproving a bill or an item here and there. Finally, in many states, the major appropriation acts were generally passed at the end of the session. If executive action on them was required before adjournment, the governor had too little time for careful scrutiny; on the other hand, if he was allowed to negative appropriation measures and items after adjournment, his veto was usually final. It was subject neither to legislative reconsideration nor to adequate public criticism, and it might be used to reward or punish members of the legislature through the approval or disapproval of "pork" projects.

Such criticisms made it increasingly clear that the veto and the item veto, when used alone, were insufficient to cope with the mounting costs of state government. An era of efficiency and economy commissions helped to focus attention on this fact as well as on the need of administrative reorganization. The outcome was a budget reform movement which swept the country and led to the enactment of budgetary legislation in forty-seven states. It is not the purpose of this article to analyze this legislation. The main question now under consideration is, "What has been the effect of the recent movement on the governor's veto power and especially on the item veto?" Obviously, the effect will vary widely in the different states. Nevertheless, the state budget systems may be classified into three groups: those established by legislative act—thirty-one states [12]—which, in form, do not affect the constitutional provisions governing the item veto, but which, in fact, may affect the operation of the item veto; those based on constitutional amendment—Maryland, West Virginia, Nebraska—which specifically curtail the scope of the item veto; and those based on constitutional amendment—Massachusetts, California—which specifically enlarge the scope of the item veto.

The budget systems of the first group may affect the use of the item negative in two ways. If the law requires the governor to prepare the budget, he has a renewed incentive to use his veto authority as a means of defending his proposals, against legislative additions. Under such circumstances, it is easy for him to disapprove special appropriation bills initiated by the legislature and new

[12] By constitutional amendment in Louisiana.

items added by that body. On the other hand, the executive has no direct power to prevent increases in the items originally submitted. The simplest remedy for this difficulty is to enlarge the item veto so as to allow the reduction of items. This step is not objectionable provided it is made an integral part of an adequate executive budget plan and not, as in Pennsylvania, an isolated and irresponsible instrument of financial control. A second effect of statutory budget systems has been to secure the enactment of the major appropriation measures long enough before adjournment so that any items disapproved therein are subject to legislative reconsideration. Thus, the item veto is made suspensive in fact as well as in theory whereas, too often under the old régime, it was absolute in fact. This speeding-up process is well illustrated by the experience of New York under the budget act of 1916. Before the passage of that act, the item veto was chiefly used after the legislature had adjourned; since then, it has been mainly exercised during the session. From 1899 to 1917, the governors of New York disapproved a total of 121 items before adjournment and 1901 after adjournment; from 1917 to 1924, they negatived 391 items before adjournment and only 7 afterwards.[13] In this connection, it may be noted that, in 1917, 4 items were repassed over the governor's veto, the first time such a thing had ever occurred in that state. A further consequence of the New York budget legislation has been to shorten the time for the executive consideration of items, since the governor has only ten days during the session as opposed to thirty days after adjournment. The result is similar in some of the other states, particularly in those where the legislature must enact the budget bill before any additional appropriation measures are considered.

Turning now to the second group of states, the operation of Maryland's executive budget plan is of chief interest. The Maryland budget amendment of 1916 has the practical effect of taking the item veto from the governor and vesting it in the legislature. Under this amendment, virtually all appropriations are initiated by the governor and presented to the legislature in his budget bill. For the most part, the legislature can only strike out or reduce items in that bill. Hence, there is little point in applying the executive veto to the budget act which, therefore, becomes law without further action by the governor. After the final enactment of the budget, the legislature is permitted a narrowly restricted power to pass special appropriation measures for particular purposes, but these are still subject to veto.

[13] *Public Papers of the Governor*, 1899–1923.

The results of the Maryland budget system are indeed striking.[14] In the 1918 budget bill, the legislature struck out only two small items and approved the rest as submitted. The general assembly then managed to pass eight insignificant special appropriation acts, of which the governor vetoed one and reduced one. In 1920, the budget was adopted without change by the legislature which, thereupon, proceeded to enact six other appropriation bills, all of which were negatived. The governor also disapproved 64 highway bills which sought to impose future obligations on the treasury. The general assembly of 1922, a more critical body than its predecessors of 1918 and 1920, struck out 18 items in the budget bill, reduced 93 others, and increased 64 items for judicial salaries.[15] On the other hand, but one act carrying a specific appropriation ($1500) was passed and this was signed by the governor.

The experience of Maryland during these years shows the effect of a thorough-going executive budget on the veto power. Since the budget bill is the only one likely to contain itemized appropriations, and since the governor may not disapprove it in whole or in part, it follows that the item veto is practically obsolete. However, the veto of special appropriation measures may be used to keep the budget totals from being exceeded and this helps to explain why such measures have been so few in number. Moreover, after the budget is passed, there is little time left for additional legislative appropriations. It is, therefore, apparent, that the veto power in Maryland has become less important as a check upon expenditure. Its chief value now is in preventing the legislature from creating new offices and authorizing new undertakings which, if sanctioned, would necessitate future appropriations.[16]

The enlarged item veto of Pennsylvania and the Maryland executive budget plan are both extreme in the degree to which they permit the governor to control appropriations. Massachusetts and California have sought a more moderate solution of the problem. Under the Massachusetts amendment of 1918, the governor prepares and submits the budget accompanied by a general appropriation bill. Until this bill has been enacted, the legislature is forbidden to pass

[14] *Laws; House and Senate Journals,* 1918–1922.

[15] The amendment permits the legislature to increase judicial and legislative items.

[16] The West Virginia budget amendment of 1918 is like that of Maryland except that the budget is not prepared by the governor but by the board of public works consisting of the governor and six other elective officers. . . .

The Nebraska budget amendment of 1920 is less drastic than those of Maryland and West Virginia. . . .

any special appropriation measures unless recommended by the governor or for purely legislative expenses. On the other hand, the general court has full power to "increase, decrease, add, or omit items in the budget," while the executive is authorized to "disapprove or reduce items or parts of items in any bill appropriating money." The item veto had not existed in Massachusetts before 1918, but, in introducing it as a part of the executive budget machinery, that state unconsciously went back to the original Confederate model, a model which sought to give the executive adequate control over expenditure without too greatly curtailing the power and usefulness of the legislature.

The results of the Massachusetts budget system may now be summarized.[17] From 1919 to 1923 inclusive, no items or parts of items were negatived or reduced by the governor. On the contrary, it was the general court which exercised a veto power over the executive budget estimates. Thus, the legislature struck out 19 items in the 1920 budget, 24 items in the 1921 budget, and 18 items in the 1922 budget. Some items were reduced, others were increased, and a few new items were added against the wishes of the governor who, nevertheless, refrained from disapproving these additions. In every year, the total amount appropriated was less than the total proposed by the executive. In each year, appropriations in addition to those contained in the original budget were made, but these were usually based either upon the supplementary budgets submitted by the governor or upon recommendations in his messages. These supplementary appropriations were enacted in relatively few bills, never exceeding seven per session. No special or private appropriation acts were vetoed by the governor. However, this does not mean that the general court entirely neglected pet schemes. Some of these were incorporated in the general appropriation act or in the supplementary bills, but the governor did not attempt to disapprove them. Others were passed without carrying specific appropriations. At each session, there were a few measures enacted which sought to impose future financial obligations on the state; ten of these were negatived as a means of sustaining the budget proposals. On the whole, the Massachusetts budget system has been a success. The governor has done careful work in revising and reducing the original departmental estimates sent to him. On receiving the budget, the general court has carried the reduction process still further so that there was little occasion to use the veto power on the appropriation bills as they were passed by the two houses. Although the estimates submitted are only tentative

[17] *Laws; House and Senate Journals; Legislative Documents*, 1919–1923.

and might be altered beyond recognition by the legislature, this has not happened, for that body through its committees has handled the budget in an efficient manner. Were this not the case, the governor probably would have made a more extensive use of his veto power than was done. The mere fact that no items were disapproved or reduced and that no bills carrying specific appropriation were negatived does not prove that the veto prerogative has no place in the budget machinery. Perhaps in the future, there will be a pronounced conflict between the legislature and the executive on the subject of finance.[18] If so, the veto and the item veto will enable the governor to force the general court to reconsider and to assume full responsibility for any budget changes which it has made.

In view of the results obtained under the several types of budget systems heretofore discussed, what shall be said in conclusion concerning the future of the item veto? It seems clear that both the veto and the item veto should be essential parts of a properly adjusted budget plan such as that existing in Massachusetts. Although the item negative in the states has outgrown its original purpose, it should not be abolished but should be retained and enlarged so as to allow the reduction of items. This, together with the ordinary veto, will afford the governor sufficient means for the protection of his estimates and, at the same time, will make unnecessary such a drastic curtailment of the legislature's power over finance as is found in Maryland. It is desirable that future budget developments in the states shall be according to the principles first tried out in the Confederate States and more recently elaborated by the experience of Massachusetts and California.

[18] Such a conflict did, in fact, develop in California, the only state which has copied (1922) the Massachusetts budget plan. The California session of 1923 was marked by friction between the governor and the legislature. The executive budget estimates called for a total appropriation of $79,754,000. The legislature did not reduce this amount but rather tried to increase it, particularly the items for educational, charitable, and penal institutions. The increases thus made totaled $1,170,000. By reducing 21 items and vetoing 28 others, the governor entirely eliminated this increase and, after a hard fight in the lower house, his action was sustained. In addition to the budget bill, 67 other appropriation bills were passed by the legislature, of which 22 were negatived by the executive. (*Laws; Assembly Journal,* 1923.)

84. HOW WE RUIN OUR GOVERNORS[1]

By Alfred E. Smith

How long would any great corporation live if the man directing its affairs was compelled to spend 75 per cent of his time doing clerical work, signing papers, listening to reports that might well be directed to a competent subordinate? Can you imagine Judge Gary of the Steel Trust, signing three copies of every lease that that corporation makes? Can you imagine him reading over the contract for the removal of ashes from one of the plants? Can you imagine him signing hundreds and hundreds of papers that might well be signed by the attorney of the corporation or by a vice-president or some equally responsible individual?

Theoretically the governor is the head of the government. He is supposed to plan the broad administrative policy. People think that he deals with large affairs. As a matter of fact his energy is consumed by trivial details of a clerical or subordinate nature. There is little time and strength left for the high functions of his office. In addition to the reorganization of administrative departments to give him easy control and supervision over executive affairs, the governor must be relieved from scores of petty duties which demand his attention at serious detriment to his work for the people.

The most annoying duty that is placed upon the governor is his chairmanship of the trustees of public buildings. The capitol and agricultural hall in Albany are directly under the control of the trustees of public buildings, and the law contains a provision that all leases made between the state and the various landlords must be executed by the trustees of public buildings.

The trustees consist of the governor, the lieutenant governor and the speaker of the assembly. It has been the fact for years that these three men come from widely different parts of the state. For the most trivial things the governor must call these men, after the adjournment of the legislature, from their homes to attend meetings for routine business.

The superintendent of the capitol should have some of the power now reposing in the trustees. He should be empowered to dispose of useless furniture and fittings. As the law now stands he cannot dispose of a broken desk or a broken chair (I had to confer over

[1] Reprinted from the *National Municipal Review*, May, 1921, by permission of the editor.

some desks worth $1.25 each) without the consent of the trustees of public buildings. They have to award all contracts, and before the contract to take the ashes out of the power house can be renewed the trustees must meet and pass upon that solemn proposition.

The state makes hundreds of leases in various cities for branches of the different state departments. Even for the small gas testing station required by the public service commission, the rental of which may be only twenty dollars a month, the governor and other trustees must sign three copies of each lease. Before part payments can be made for contracts for repairs to the capitol the trustees must approve, although the determination of the matter is naturally in control of the state architect.

JANITOR DUTY

If a room is to be painted in the capitol or a new strip of carpet is to be laid, there must be a meeting of the trustees, and the work cannot progress until the governor lays aside his other duties and takes up for consideration the question of a few pots of paint.

The superintendent of buildings is so limited in his authority that he is really the janitor of the building, and seldom makes any important move without seeking the advice of the governor or his secretary, all of which takes considerable time. His powers should be amply extended. He should be given the same authority as other department heads. That would relieve the governor greatly.

SIGNING PAROLES

The law requires that the governor sign all the parole sheets before men are liberated from the various prisons of the state, even after they have completed the minimum time for which they were sentenced. This is an absolutely useless proceeding. The governor can have no personal knowledge of it, and simply signs the sheets certified to him by the board of parole. They properly should be signed by the superintendent of prisons, he being in possession of all the records. They are brought before the governor, and without any knowledge of his own, and no opportunity of gaining any, he simply goes through the empty formality of signing them. They come with great frequency. Every time the board of parole meets, the lists are brought in. Not only must they be signed by the governor, but they must be attested by the secretary; thus the time of two busy men is taken up in a useless performance, which should be handled entirely by the superintendent of prisons.

In order that police officials appointed by railroad companies may have a state-wide power of arrest, some time ago the law was amended providing for their appointment by the governor. That means that large stacks of certificates of appointment of railroad policemen are laid before the governor for his signature. He does not know the men he appoints, and has to reply upon the railroad as to their integrity and honesty when having conferred upon them by the governor the power of arrest. If such appointments are necessary (which is probable) by some state power, it certainly ought not to be in the hands of the governor. I have spent whole hours at a time writing my name to appointments of railroad policemen. These men should be appointed by the attorney-general who has deputies to assist him in his work. Unfortunately there is no deputy governor.

AN ARMY OF NOTARIES

All applications for notaries public—and there are some 65,000 of them in the state—are sent to the executive chamber, making necessary a whole department in the governor's office for the handling of the applications. This function does not belong in the executive chamber. It should properly be either in the attorney-general's office or in the office of the secretary of state, where a large part of it might well be performed by deputies.

There is a provision of law which requires the governor to sign all contracts for repairs and betterments in the state hospitals—not only sign the contract, but also the architect's blue-prints. He knows nothing about it and signs them usually upon the recommendation of the state architect. The law ought to be amended so that they be signed by the architect himself, and if there must be any check on the architect, it certainly should be by somebody in a position to know something about it, and not the governor.

STATE CONSTABULARY

The act creating the state constabulary contains a provision that the constabulary are not to exercise their powers in case of strike or riot within the boundaries of an incorporated city without the consent of the governor. This provision operated to make the governor the police commissioner when troops are needed for the suppression of riots inside of cities.

The result of this has been to cause the governor not only annoyance in the daytime, but at night. I was frequently called out of bed at night by the officials of small cities asking for the assistance

of the state constabulary. In a great many instances their troubles were imaginary.

I have in mind one particular case where I was called up in the night by one official of the government of a city asking for the constabulary and called up an hour later by another official of the same city advising me not to send them in. That made necessary a conference in the nighttime with the superintendent of the state police and we satisfied everybody by sending the men there in citizens' clothes.

LAST-MINUTE BILLS

There is another important matter that deserves serious attention, that might be easily remedied. It would require only legislative action, either by amendment to the rules, or if not, by amendment of the legislative law, to prevent the dumping of a large number of bills into the executive chamber, giving the governor only thirty days to consider them.

At the last session of the legislature I had 856 thirty-day bills. That meant that I was given only thirty days to consider 856 bills. A great many of them were purely local in character; a great many of them were bills empowering the court of claims to hear and audit claims against the state.

This could be remedied by an amendment to the rules of the senate and assembly prohibiting the passage of purely local bills after a certain date in the session, so that the legislature may pass its unimportant local bills in the early months of the session, leaving the calendars clear at the end of the session for a discussion of the large proposals that affect all the people of the state.

This procedure would also give to the governor plenty of time and opportunity, in the thirty-day-bill period, to study out the larger proposals, and not have his time and the time of his office force taken up in passing on little local matters.

My experience at the close of the last session showed me that the large number of bills left with me could not be intelligently disposed of unless I worked from 9.30 in the morning until 1 or 2 o'clock the following morning. It is too much of a strain to put on the governor, and leaves him useless for some time after.

OTHER SMALL DUTIES

There are numerous other small detail duties that fall upon the governor in dealing with the great number of boards and commissions that we have transacting the state's business. The governor would

be greatly relieved by the passage of the constitutional amendments reducing the large number of boards and commissions to eighteen departments of government, presided over by men given by law the necessary power to transact all the business of their departments.

The governor is unable to deny to citizens of the state serving on boards and commissions without salary, an opportunity to present to him their views about what is going on in their different institutions. Nothing takes more of the governor's time than listening to the complaints about the management of various institutions, large and small, all of which detail ought to be up to a man charged with that duty and with no other. It is because of that condition that I had to make a special trip to Bedford Reformatory, following the recent newspaper stories of riot and disorder at that institution.

The total net result of a New York governor's too-plentiful duties is that the great, big, prominent questions that affect the welfare of a commonwealth of over 10,000,000 people are subordinated to the small, tiresome and irritating tasks that are put upon the governor by statute.

85. HOW TO SAVE OUR GOVERNORS FROM RUIN[1]

By Arch Mandel

Ex-Governor Smith of New York deplores the fact, and rightfully so, that governors are ruined by being obliged to attend personally to innumerable and unimportant details of administration.[2] This complaint doubtless strikes a sympathetic chord in the minds of every contemporary and ex-governor in the Union.

The statement that "unfortunately there is no deputy governor" made by Governor Smith in his article on "How We Ruin Our Governors" brings sharply to our attention an absurd tradition in the organization of our states and nation. New York State, and all other states have deputy governors, or lieutenant governors, as they are called, but for all practical purposes they might as well be nonexistent.

PUT THE LIEUTENANT GOVERNOR TO WORK

In face of the burdens imposed upon governors in the administration of a commonwealth, lieutenant governors are pigeon-holed by

[1] Reprinted from the *National Municipal Review*, August, 1921, by permission of the editor.

[2] See Nat. Mun. Rev. for May, '21.

being assigned the duties of presiding over senates and gracing public functions with their presence and speeches. Here are officers who could, if profitably employed, be of service to their states by releasing governors for their larger executive duties, and at the same time get things done for the state that governors, under present conditions, can only half do.

Furthermore, it must be borne in mind that all lieutenant governors are potentially governors; that when the occasion arises, and many such occasions have arisen, they must assume the office and duties of governor. Yet there is nothing in the duties performed by lieutenant governors that fits them to be chief executives of commonwealths. In fact, they are less fitted by training for this office than are chairmen of important legislative committees.

It must also be recognized that so long as the office of lieutenant governor carries with it nothing but an empty title, and is a blind alley politically, men of capacity and ability, men of large affairs who aspire to public service, will not seek the office nor will they have it thrust upon them.

Many of the ills described by Governor Smith will be corrected by the reorganization of the governmental machinery that tends to throw responsibility for getting things done upon a limited number of department heads of ability. Yet the governor as the executive of the state, responsible for the proper administration of all departments and institutions, must of necessity give some attention to these problems. Even with the help of capable department heads the task of giving personal attention to large problems affecting the welfare of a few million persons and following the administration of state activities is too big for one man.

PLAN RECOMMENDED IN MICHIGAN

Recognizing these facts, Dr. Wm. H. Allen, of the Institute for Public Service, in his report on the reorganization of Michigan's state government, recommended two alternative solutions for "insuring preparedness to assume the duties of a deceased or removed governor while at the same time giving the state better government:

Alternative 1. The lieutenant governorship might be combined with the auditorship in one elective officer, in which case the senate should select its own chairman as the assembly now does.

Alternative 2. The lieutenant governor might be given five more duties beside that of presiding over the senate:

1. Visit every state department and activity at least once a year.
2. Serve as chairman of statutory investigating boards, like the

board of corrections and charities, without power to vote except in case of tie;

3. Attend meetings of semi-judicial bodies, like the utilities commission, with power to question witnesses;

4. Review budget estimates;

5. Report to the legislature at the end of each biennium evidence gathered from his studies of forward steps taken, of inefficiency and extravagance observed, and of administrative and legislative changes needed."

Carrying out these recommendations would serve two purposes;

1. It would lighten the burden of the governor, who cannot carry out the duties of his office, no matter how hard working, conscientious and willing he is to do so.

2. It would insure states efficient and capable governors should the men elected to the office resign or die, or become incapacitated.

86. THE DEVELOPMENT OF THE POWER OF THE STATE EXECUTIVE[1]

By Margaret C. Alexander

EXTRA-CONSTITUTIONAL DEVELOPMENT OF THE GOVERNOR'S POWER

The constitutional evidence for the development of the power of the governor is slight. The reaction from colonial experience with a strong executive caused the chief power to be vested in the legislature. When that body proved unworthy a shift was made in the disposition of authority. Tradition being against the governor, power in general was transferred to the electorate with an occasional increase in the executive patronage. A few states gave the governor extensive powers to investigate the affairs of the departments, especially the financial department. The tendency to provide a four-year term is apparent.[2] The only persistent and universal extension of the governor's authority has been in the line of control over legislation through the veto. But, as in every constitutional government there are changes in the actual form of government not registered in the written document, so our states have developed unwritten

[1] Reprinted from the *Smith College Studies in History*, April, 1917, by permission of the Board of Editors.

[2] Constitution of Maryland, Art. II, Sec. 18; Constitution of Georgia, Art. V, Sec. 1, Par. XVIII. Four-year term in twenty-two states. "Index Digest of State Constitutions," 744.

constitutions. The average duration of a state constitution is thirty years; ten have lasted more than sixty;[3] and Massachusetts is still operating under her original constitution, with only forty-four amendments. In a generation new conditions will inevitably develop demanding a changed scheme of government to meet them, and this is especially true of the executive department.

The modification of the governor's position is apparent in both the political and administrative branches of the executive power. The social and economic development of the latter part of the nineteenth century produced a tremendous increase in state activities, and thus administrative agencies became necessary. At first the legislature appointed committees of its own members to perform these functions. Later, boards and commissions were organized to take them over, bodies created by the legislatures, which prescribed also the methods by which they should be chosen. Largely through want of foresight, no definite administrative scheme was followed in organizing them. Some were only temporary; others became permanent. As the paternalism of the state increased the boards multiplied. In 1913 the legislatures of 35 states established 236 boards or commissions and abolished only 79. The government of the state of New York includes 169 distinct agencies, among which are included the various departments, boards, commissions and offices.[4] The result of this development has been two-fold. The governor's patronage has been increased, since he appoints the majority of the boards. But there his control usually ends. The law organizing a commission is frequently so expressed as to deny him power of removal, or it so restricts him as to make removal impossible except for flagrant misconduct.[5] Furthermore, the term of the commission is seldom coterminous with that of the governor and as it is often a continuous body, he generally has power to appoint only a part of it. Thus restrained, he can exercise no effective control over the policy of the board or commission. Nevertheless, functions logically belonging to the executive have been transferred to these agencies. Consequently the governor has been deprived of much power which should rest in his hands.

Attention has been called to the decentralizing tendency in the popular election of administrative officers. The development of these

[3] J. Franklin Jameson, "Introduction to the Constitutional History of the States," *Johns Hopkins University Studies,* IV, 193.

[4] "Government of the State of New York, Department of Efficiency and Economy and the Bureau of Municipal Research," 1915.

[5] F. H. White, "State Boards and Commissions," *Political Science Quarterly,* XVIII, 645.

agencies completed the process and broke down all semblance of centralized authority. The result was inevitable. Extravagance and inefficiency became so flagrant that there was a demand for reform. Strangely enough, the first pleas for centralization resulted in the creation of a new type of commission, the department of efficiency and economy. Thirteen states [6] created agencies of this kind to investigate conditions and to recommend reforms in state administration. Political parties began to incorporate in their platforms suggestions for the centralization of authority in a responsible executive. Thus, the Massachusetts platform of 1901 recommended that all state officials should be appointed by the governor and should be subject to removal by him alone.[7] In New York the republican platform of 1914 contained the following: "We recommend a substantial reduction in the number of elective officials by the application of the principle of the short ballot to the executive officers of the state. To prevent the multiplication of officers we recommend that the various administrative functions of the state so far as practicable be vested in a limited number of departments. The present duplication of effort and expense in the public institutions of the state should be remedied by the establishment of a simpler and better organized system." In the democratic platform of the same year are the words: "To center responsibility for executive and administrative action, we favor an amendment to the constitution providing for the election only of the governor, lieutenant-governor, comptroller and attorney-general." [8] An examination of the political writings of the day reveals the same desire for concentration of responsibility in the governor. The schemes vary in detail but they agree in regard to the necessity of increasing the governor's appointing power.[9] An administrative system like that of the national government is advocated,[10] whereby the governor would appoint the heads of departments, who would be directly responsible to him and constitute his cabinet. These heads would appoint the chiefs of bureaus, who

[6] Illinois, Iowa, Louisiana, Massachusetts, Minnesota, Mississippi, Nebraska, New Jersey, New York, Pennsylvania, South Dakota, Wisconsin. See Dealey, "Growth of American State Constitutions," 165. Also, *American Political Science Review,* VIII, 63–64.

[7] G. Bradford, "Powers of the Executive," *The Nation,* LXXXVI, 257.

[8] "Record of the Constitutional Convention of the State of New York," 1915, III, 3220.

[9] L. A. Blue, "Relation of the Governor to the Organization of Executive Power in the States," 6. Also, "State Governmental Organization," *American Political Science Review,* IV, 243; "American Year Book," 1913, pp. 81–82.

[10] F. A. Magruder, "Recent Administration in Virginia," *Johns Hopkins University Studies,* XXX, 198.

would name their subordinates. A hierarchy would thus be created which would eliminate the independent board or commission and bring the administrative system under a single responsible head.

In the field of legislation we find a less conscious attempt to strengthen the governor's position. Gradually, through force of circumstance, however, his importance has increased until he has become the controlling force in legislation. In this respect the theory of government is against the governor, as the typical state constitution distinctly prescribes a separation of departments. Experience has proved the difficulty of applying this theory in actual government. The usurpation of executive power by the legislature and the tendency to restore to the executive his normal functions have been demonstrated. But the executive has also usurped legislative powers through the extension of the veto, a change in his legislative authority outside the range of any constitutional provisions. The reason for this change lies in the increasing popular demand for leadership. Our legislatures are tremendously active in turning out legislation. Every two years congress and the state legislatures together make about 25,000 laws, a large proportion of which, however, are special or local. The perspective of the average legislator is limited to his particular district, which makes him an excellent local representative. The state, however, has adopted so many paternal functions that a well constructed, comprehensive scheme of legislation is essential, and the legislators are generally incapable of furnishing such a scheme. The people, as such, cannot do so. Some one must be found to interpret their will and present it concretely to the legislature. Granting there are legislators with broad range of vision, the quality of the average member makes differentiation hard. Consequently the task of acting as the chief medium of progressive law-making has fallen to the governor. In his annual messages he outlines a legislative program for the year and supplements it with special messages. Every year bills known as "administration bills" are introduced, which really emanate from the governor. Furthermore, he appears before informal meetings of legislative committees and discusses with them questions of public policy, advocating measures which he thinks public opinion demands. Finally, he sends for members of the legislature to urge them to vote for particular measures. It has been said that the primary qualification now required of an assemblyman is intelligence enough to vote for what the governor wants. There are many examples of governors who have stood out as successful champions of advanced legislation, as for example, Governor Wilson in New Jersey, Governor Johnson in Minnesota, Governor Hoch in

Kansas, Governor Harmon in Ohio, and Governor Hughes in New York.[11] The necessity for the encroachment of the executive upon the ordinary functions of the legislative department has been so far recognized that one of our most conservative periodicals defended ex-Governor Hughes from the charge of executive usurpation on the ground that he first tried to ascertain what was best for the state and then publicly uttered his convictions. Such action, it contended, was not "government by executive usurpation but government by public opinion after discussion." [12] The problem resolves itself into a choice between government by the direction of the governor, a legally recognized agent, or by the political boss. The new rôle of the governor is to act as the virtual boss of the state and shape the course of legislation for the general benefit instead of for private and special interests. This has been so far recognized that plans have been suggested whereby the governor would be given the legal initiative in legislation and the right to take part in the debates of the legislature.[13]

A similar tendency of the times is the agitation for an executive budget. The rigid separation of departments resulted in an absence of executive influence in the preparation of the budget. The state constitutions make practically no provision for such control. It is true that the power to veto items in appropriation bills makes the governor's influence felt in the adjustment of the appropriation side of the budget. Thirty-five states allow the governor to require information from the executive officers respecting the condition of their offices. Only nine give him power to suggest to the legislature what must be raised by taxation for state purposes. Beginnings of executive control over finance may be found, however, in state legislation affecting budgetary methods. The laws of New York dealing with this question will be considered later. Ohio, in 1913, made the following provisions for an executive budget.[14] Biennially, the various departments, commissioners, and officers of the state are required to submit to the governor itemized estimates of what is needed for the

[11] Mathews, "The New Rôle of the Governor," *American Political Science Review,* VI, 225; G. W. Alger, "Executive Aggression," *Atlantic Monthly,* CII, 583; *The Nation,* LXXXVI, 208; XCII, 416.

[12] *The Nation,* LXXXIV, 558.

[13] Mathews, "The New Stateism," *North American Review,* CXCIII, 808–815. G. Bradford, "President or Governor as Lobbyist," *The Nation,* LXXXVI, 422; "State Governmental Organization," *American Political Science Review,* VI, 243.

[14] E. E. Agger, "The Budget in the American Commonwealths," *Columbia University Studies,* XXV, 160; "Index Digest of State Constitutions," 1183–1184, 1338; *American Political Science Review,* VIII, 57–58.

next biennial period. The governors can appoint examiners to ascertain the condition of any spending department and to make recommendations relative to the expenditures of that department, the examiners to be paid out of the appropriation for the executive department. Finally, the auditor is required to furnish the governor a statement showing the unexpended balance to the credit of each department and office at the end of the last fiscal year, the monthly average of expenditures, and the revenue for the last fiscal year and for the last four years. With these estimates, reports, and statements as a basis the governor must frame and submit to the general assembly the state budget for the next biennial period. This practice meets most of the requirements of efficient budget-making but contains a fundamental weakness in not allowing the governor control over the budget after it has passed into the hands of the legislature. Oregon, North Dakota, and Washington provide for a centralized budgetary system but none of the states make the governor the budget-making authority.

Before passing to a discussion of the governor's position in New York it may be well to sum up whatever conclusions may be drawn in regard to the development of the chief executive office in the states. The beginning of our national period presents evidence of a weak executive department, with a governor whose position is almost nominal. With the exception of the veto the constitutional changes of the nineteenth century do not make a radical, or even fundamental, increase in the powers of the governor. On the contrary, the rise of popular sovereignty causes a diffusion rather than a concentration of authority and produces a disintegration of the administrative system tending to weaken the executive. It is not until the twentieth century that the inefficiency of our state government becomes so marked that the necessity of a redistribution of powers becomes apparent. The state has failed in two of its three basic functions of government: legislation and administration. The form of government prescribed by the fundamental law of the state has proved itself incapable of coping with the complexities of modern governmental business. A constitutional reorganization seems difficult to obtain, and consequently extra-legal means are conceived whereby the governor becomes the guiding force in legislation. The constitutional veto has made him the controlling factor. Less has been accomplished in the field of administration, but more and more the governor is being held responsible for the efficient conduct of the administrative departments and the tendency to confer upon him power commensurate with that responsibility is becoming gradually perceptible. As

yet, however, he does not hold that central position in administration which he must obtain before his constitutional injunction to see that the laws are faithfully executed can be obeyed.

Beard, (4th Ed.), pp. 558–574.
Mathews, pp. 211–240.
Kimball, *State and Municipal Government,* pp. 131–148.
Ogg and Ray, (2nd Ed.), pp. 685–700.
Dodd, *State Government,* pp. 233–247.

XXII

THE SHORT BALLOT AND ADMINISTRATIVE REORGANIZATION

One most striking development in government is the multiplication of state activities and the consequent expansion of state administrative machinery. The reasons for this may be traced to the great social and economic changes which have taken place in this country. The demand for industrial and social welfare legislation, the important scientific advances in health, agriculture, and forestry, and the ideal of democracy in education have greatly increased the business of the state, while population pressure has caused the state government to take over activities which formerly were left to the city, county, and town authorities. The spoils system has likewise contributed in some degree. The tax agencies of the state have been enlarged and extended in order to meet the ever-increasing demands for money to pay the cost of new enterprises.

The increase in the number of agencies may be seen in the case of New York. Until 1800 ten agencies were established, and from 1800 to 1850 ten more were added. In the next fifty years the administrative services developed more rapidly, so that in 1900 they numbered eighty-one. In 1925 the state government was composed of about 170 boards, commissions, and other independent agencies. Here, then, is a striking illustration of the need for administrative consolidation. The same situation may be found in the other states of the Union which have not reorganized their respective administrations.

As each new agency was created it was added as a separate unit, and little or no attempt was made to establish formal or legal relationships with other agencies engaged in more or less similar activities. Executive responsibility was never possible, and each unit functioned without the direction of either governor or legislature. The governor had no power and the legislature had no machinery of supervision. The problem of administrative reorganization was brought to the attention of administrators by the New York State Constitution of 1915, which was not adopted by the voters, and by the successful consolidation scheme of Governor Lowden of Illinois in 1917. Since then eleven states have reorganized their administration and many others have considered such proposals.

The most recent illustration of reorganization is New York. A movement which began in 1910 has resulted in a complete reorganization of the administrative departments board on a constitutional amendment.

87. PRINCIPLES OF ADMINISTRATION[1]

By Luther Gulick

Are there recognizable "laws" or "principles" in the field of public administration? The question has been answered indirectly by several students of government who have made the effort to extract from experience the immutable laws of administration and to distill them in a simple form for practical application. The Bureau of Municipal Research group, headed by Frederick A. Cleveland and Charles A. Beard, have probably pushed further than others in this country, at least the pioneering has fallen to them. This is probably because the research bureaus have had the opportunity to study the facts first-hand and because they have been faced with the necessity in connection with their surveys and advisory work of formulating rules for practical application. The short balloteers, led on by Richard S. Childs and A. R. Hatton, have also done yeoman service in the formulation of rules of government organization. In all this groping for principles, one would hesitate to claim that the process has been thoroughly scientific. The municipal researchers (fortunately for progress) have not enjoyed the academic calm which would permit them to wait until all the facts were in, nor has it been possible to suspend judgment or action until every hypothesis could be thoroughly tested. And there has been a certain zeal, especially with the ballot-shorteners, which has ferreted out principles calculated to clothe with the sanctity of natural law the beliefs and dogmas of the cult.

THE AMERICAN STATEMENT

An American statement of principles has never been brought together in a complete systematic form. Perhaps the summary presented by Dr. Beard in the *Administration and Politics of Tokyo*[2] is as comprehensive as any, though this summary was presented, of course, in connection with the problems of an Oriental metropolis. The principles are stated as follows:

The number of departments in a city administration should be determined by the number, variety, and magnitude of the major functions vested in the city government as a whole.

[1] Reprinted from the *National Municipal Review*, July, 1925, by permission of the editor.

[2] Page 47.

Each department should have as nearly as possible a distinct function or class of functions to perform, if the volume of business warrants this.

All closely related functions should be grouped together in the same department, and the number of bureaus or divisions within the department should be determined by the number, variety, and magnitude of the functions assigned to it.

The power of each department head and each bureau (or division) chief should be commensurate with the responsibilities imposed upon him.

The responsibility for each function and the power to discharge it should be vested in a specific officer, and the lines of responsibility from subordinates to superiors should be definitely fixed.

The head of each large department should have an independent staff or agency to keep him informed as to the performance of his subordinates and as to their positive achievements.

As functions cannot be sharply separated and a certain amount of overlapping is necessary, provision should be made for the close co-operation of related departments.

There should be an accounting control independent of the operating or directing head of each department.

The mayor or chief of the entire administrative structure should have the power to appoint and discharge his department heads and to direct their work within the limits of the law. He should have a research staff charged with two functions: (1) examining and reporting on the work of departments and (2) searching for new and improved methods of operation.

A. E. Buck has summarized the rules under the following five heads: [3]

1. *Departmentalize all administrative activities.* All administrative offices, boards, commissions, and agencies of the state should be consolidated into a few departments, each of which comprehends a major function of government, such as agriculture, finance, public welfare, or public works. The major functions should be determined mainly by the conditions within the state and the scope of its existing activities. For example, reclamation may be a major function in one state and not in another.

2. *Fix definite lines of responsibility.* Each department should be headed by a single officer appointed and removable by the governor. This arrangement fixes definitely responsibility for the administrative work of the government and makes the governor in fact, as well as in theory, the responsible chief executive of the state. The department heads can then constitute a cabinet to advise with the governor in matters of administration and to assist him in budget making. This

[3] *Administrative Consolidation in State Governments,* pp. 37–38.

principle involves, among other things, the reduction of the number of elective administrative officers to two, the governor and the auditor, the latter to act as an independent check upon the work of the administration. It would be preferable to have the auditor appointed by the legislature instead of elected by the people, so that he might be the representative of the legislature in making a critical examination of the administration.

3. *Taboo boards for administrative work.* Boards or commissions should not be used for purely administrative work. They are generally found inefficient owing to division of powers and absence of initiative and responsibility. Ex-officio boards are almost never effective. Whenever there are quasi-legislative, quasi-judicial, advisory, or inspectional functions within a department, a board may with advantage be attached to the department to perform any one of these functions.

4. *Co-ordinate terms of office.* The term of the governor should be four years, and the terms of the department heads, if they are to be definitely fixed, should be carefully adjusted with reference to that of the governor. The department heads should not have longer terms than that of the governor. It is preferable to let the department heads serve at the pleasure of the governor. However, the members of boards performing quasi-legislative, quasi-judicial, inspectional, or advisory functions under the departments may be appointed for longers terms than that of the governor.

5. *Organize departments internally.* Closely related work in each department should be grouped under appropriate bureaus and divisions, responsibility for the work of each bureau of division being placed on a single officer directly accountable to the head of the department. The bureau heads should, as a general rule, be appointed by the department heads under which they work.

Somewhat the same field is covered in a paper which I presented to the National Tax Association in 1923 which dealt with the organization of the state tax department.[4]

THE ENGLISH STATEMENT

Montagu H. Cox, clerk of the London County Council, has endeavored to make a similar summary based on his observation and study of English government. His statement is as follows:[5]

1. The duties to be performed by officers of a local authority should be grouped into departments, each department being entrusted to a single responsible officer. He should be provided with a sufficient staff.

2. Departments should be formed according to (i) professions, and

[4] *1923 Proceedings,* p. 266.

[5] *Local Government News,* April, 1925.

(ii) duties of similar character. A separate department, more or less self-contained, may be formed for any single service in which the professional duties are so interwoven with its administration that its separation would be difficult.

3. The number of departments should be as small as possible.

4. Each department should be of sufficient size to justify the employment of a whole-time head of the department at a salary sufficient to attract a man of qualifications and ability.

5. Co-ordination between departments should be entrusted to the town clerk.

6. The office of town clerk (or clerk of the council) should not be combined with any other office.

7. The number, status, and scales of pay of the several grades of staff required in each department should be assessed and reviewed periodically.

8. Scales of pay and other conditions of regulating the prospects of officers, such as promotion, holidays, sick pay, and interchangeability, should be clearly laid down.

9. The technical and professional staff should be recruited by public advertisement upon clearly stated qualifications.

10. Administrative and clerical (*i. e.*, routine) staff should be recruited by means of competitive examination. The clerical should be eligible for transfer to the administrative by examination in specialized subjects which are the concern of local authorities. Some provision should also be made for direct entrance to the administrative staff.

11. Provision should be made for the interchange of administrative staff between the several departments, by way of exchange and promotion.

A comparison of the statement of principles by Mr. Cox with the statements above which have been taken as representative of American experience shows a very interesting agreement on the essential points. Mr. Cox throws a great deal more emphasis upon the problem of personnel. Fully half of his points deal primarily with this problem. Though we are beginning to recognize the great importance of sound personnel policy and administration in the United States, and though no one would disagree with the principles of personnel laid down by Mr. Cox, the American statements do not emphasize personnel to this extent. Mr. Cox is more specific in defining departmental lines in point 2. His insistence that the number of departments should be small, that each department should be entrusted to a single responsible officer, and that the town clerk should be free from line services and should serve purely as the co-ordinator between departments, is thoroughly in accord with the principles as formulated by American students including the researchers and the ballot-shorteners. Even the wide difference in the form of local

government on the two sides of the Atlantic has not served to carry the students of government far apart in their statements of principles of public administration.

88. INVISIBLE GOVERNMENT[1]

By Elihu Root

The Convention in Committee of the Whole, having under consideration the bill to reorganize and consolidate the executive departments of the State, Mr. Root said:

Mr. Chairman, I have had great doubt whether or not I should impose any remarks on this bill upon the Convention, especially after my friend Mr. Quigg has so ingeniously made it difficult for me to speak; but I have been so long deeply interested in the subject of the bill, and I shall have so few opportunities hereafter, perhaps never another, that I cannot refrain from testifying to my faith in the principles of government which underlie the measure, and putting upon this record for whatever it may be worth the conclusions which I have reached upon the teachings of long experience in many positions, through many years of participation in the public affairs of this State and in observation of them.

I wish, in the first place, to say something suggested by the question of my friend, Mr. Brackett, as to where this short ballot idea came from. It came up out of the dark, he says.

Let us see. In 1910, Governor Hughes, in his annual message, said this to the Legislature of the State: "There should be a reduction in the number of elective offices. The ends of democracy will be better attained to the extent that the attention of the voters may be focused upon comparatively few offices, the incumbents of which can be strictly accountable for administration. This will tend to promote efficiency in public office by increasing the effectiveness of the voter and by diminishing the opportunities of political manipulators who take advantage of the multiplicity of elective offices to perfect their schemes at the public expense. I am in favor of as few elective offices as may be consistent with proper accountability to the people, and a short ballot. It would be an improvement, I believe, in state administration if the executive responsibility was centered in the governor, who should appoint a cabinet of administrative heads

[1] Speech by Elihu Root in the New York Constitutional Convention on Executive Reorganization as a step towards the abolition of "Invisible Government," August 30, 1915.

accountable to him and charged with the duties now imposed upon elected State officers."

Following that message from Governor Hughes, to whom the people of this State look with respect and honor, a resolution for the amendment to the Constitution was introduced in the Assembly of 1910. That resolution provided for the appointment of all State officers, except the Governor and the Lieutenant-Governor.

There was a hot contest upon the floor. Speaker Wadsworth, "Young Jim," came down from the Speaker's chair to advocate the measure, and Jesse Phillips, sitting before me, voted for it. And so, in the practical affairs of this State, the movement out of which this bill came had its start upon the floor of the State Legislature.

Hughes and Wadsworth, one drawing from his experience as Governor and the other upon his observations of public affairs from the desk of the Speaker of the Assembly, were its sponsors. . . .

Now, let me turn to the other side of the story. When the resolution for the short ballot, simon-pure, making all the State officers but the Governor and Lieutenant-Governor appointive, was before the Assembly of 1914, Mr. A. E. Smith, the member of this Convention whose attractive personality has so impressed itself upon every member, moved an amendment to limit the change to appointment of the Secretary of State, State Engineer and Surveyor and State Treasurer, leaving the Comptroller and Attorney-General elective. Upon that amendment the Democrats of the Assembly stood, voting with him. When the Democratic convention met in that autumn they put themselves on Mr. Smith's platform, approved his action and that of the Democrats in the Assembly and declared in favor of exactly what he called for in his amendment—the election of the Comptroller and the Attorney-General and the appointment of all the other officers.

Now, anybody can see that all these 152 outlying agencies, big and little, lying around loose, accountable to nobody, spending all the money they could get, violate every principle of economy, of efficiency, of the proper transaction of business. Everyone can see that all around us are political organizations carrying on the business of government, they have learned their lesson from the great business organizations which have been so phenomenally successful in recent years.

The governments of our cities: Why, twenty years ago, when James Bryce wrote his "American Commonwealth," the government of American cities was a byword and a shame for Americans all over the world. Heaven be thanked, the government of our cities has now gone far toward redeeming itself and us from that disgrace, and

the government of American cities today is in the main far superior to the government of American States. I challenge contradiction to that statement. How has it been reached? How have our cities been lifted up from the low grade of incompetency and corruption on which they stood when the "American Commonwealth" was written? It has been done by applying the principles of this bill to city government, by giving power to the men elected by the people to do the things for which they were elected. But I say it is quite plain that that is not all. It is not all.

I am going to discuss a subject now that goes back to the beginning of the political life of the oldest man in this Convention, and one to which we cannot close our eyes, if we keep the obligations of our oath. We talk about the government of the Constitution. We have spent many days in discussing the powers of this and that and the other officer. What is the government of this State? What has it been during the forty years of my acquaintance with it? The government of the Constitution? Oh, no; not half the time, or half way. When I ask what do the people find wrong in our State government, my mind goes back to those periodic fits of public rage in which the people rouse up and tear down the political leader, first of one party and then of the other party. It goes on to the public feeling of resentment against the control of party organizations, of both parties and of all parties.

Now, I treat this subject in my own mind not as a personal question to any man. I am talking about the system. From the days of Fenton, and Conkling, and Arthur and Cornell, and Platt, from the days of David B. Hill, down to the present time the government of the State has presented two different lines of activity, one of the constitutional and statutory officers of the State, and the other of the party leaders,—they call them party bosses. They call the system —I don't coin the phrase, I adopt it because it carries its own meaning—the system they call "invisible government." For I don't remember how many years, Mr. Conkling was the supreme ruler in this State; the Governor did not count, the legislatures did not count; comptrollers and secretaries of state and what not, did not count. It was what Mr. Conkling said, and in a great outburst of public rage he was pulled down.

Then Mr. Platt ruled the State; for nigh upon twenty years he ruled it. It was not the Governor; it was not the Legislature; it was not any elected officers; it was Mr. Platt. And the capitol was not here; it was at 49 Broadway; Mr. Platt and his lieutenants. It makes no difference what name you give, whether you call it Fenton or Conkling or Cornell or Arthur or Platt, or by the names of men now

living. The ruler of the State during the greater part of the forty years of my acquaintance with the State government has not been any man authorized by the Constitution or by the law; and, sir, there is throughout the length and breadth of this State a deep and sullen and long-continued resentment at being governed thus by men not of the people's choosing. The party leader is elected by no one, accountable to no one, bound by no oath of office, removable by no one. Ah! My friends here have talked about this bill's creating an autocracy. The word points with admirable facility the very opposite reason for the bill. It is to destroy autocracy and restore power so far as may be to the men elected by the people, accountable to the people, removable by the people. I don't criticise the men of the invisible government. How can I? I have known them all, and among them have been some of my dearest friends. I can never forget the deep sense of indignation that I felt in the abuse that was heaped upon Chester A. Arthur, whom I honored and loved, when he was attacked because he held the position of political leader. But it is all wrong. It is all wrong that a government not authorized by the people should be continued superior to the government that is authorized by the people.

How is it accomplished? How is it done? Mr. Chairman, it is done by the use of patronage, and the patronage that my friends on the other side of this question have been arguing and pleading for in this Convention is the power to continue that invisible government against that authorized by the people. Everywhere, sir, that these two systems of government co-exist, there is a conflict day by day, and year by year, between two principles of appointment to office, two radically opposed principles. The elected officer or the appointed officer, the lawful officer who is to be held responsible for the administration of his office, desires to get men into the different positions of his office who will do their work in a way that is creditable to him and his administration. Whether it be a president appointing a judge, or a governor appointing a superintendent of public works, whatever it may be, the officer wants to make a success, and he wants to get the man selected upon the ground of his ability to do the work.

How is it about the boss? What does the boss have to do? He has to urge the appointment of a man whose appointment will consolidate his power and preserve the organization. The invisible government proceeds to build up and maintain its power by a reversal of the fundamental principle of good government, which is that men should be selected to perform the duties of the office; and to substitute the idea that men should be appointed to office for the preserva-

tion and enhancement of power of the political leader. The one, the true one, looks upon appointment to office with a view to the service that can be given to the public. The other, the false one, looks upon appointment to office with a view to what can be gotten out of it. Gentlemen of the Convention, I appeal to your knowledge of facts. Every one of you knows that what I say about the use of patronage under the system of invisible government is true. Louis Marshall told us the other day about the appointment of wardens in the Adirondacks, hotel keepers and people living there, to render no service whatever. They were appointed not for the service that they were to render to the State; they were appointed for the service they were to render to promote the power of a political organization. Mr. Chairman, we all know that the halls of this capitol swarm with men during the session of the Legislature on pay day. A great number, seldom here, rendering no service, are put on the payrolls as a matter of patronage, not of service, but of party patronage. Both parties are alike; all parties are alike. The system extends through all. Ah, Mr. Chairman, that system finds its opportunity in the division of powers, in a six-headed executive, in which, by the natural workings of human nature there shall be opposition and discord and the playing of one force against the other, and so, when we refuse to make one Governor elected by the people the real chief executive, we make inevitable the setting up of a chief executive not selected by the people, not acting for the people's interest, but for the selfish interest of the few who control the party, whichever party it may be. Think for a moment of what this patronage system means. How many of you are there who would be willing to do to your private client, or customer, or any private trust, or to a friend or neighbor, what you see being done to the State of New York every year of your lives in the taking of money out of her treasury without service? We can, when we are in a private station, pass on without much attention to inveterate abuses. We can say to ourselves, I know it is wrong, I wish it could be set right; it cannot be set right, I will do nothing. But here, here, we face the duty, we cannot escape it, we are bound to do our work, face to face, in clear recognition of the truth, unpalatable, deplorable as it may be and the truth is that what the unerring instinct of the democracy of our State has seen in this government is that a different standard of morality is applied to the conduct of affairs of State than that which is applied in private affairs. I have been told forty times since this Convention met that you cannot change it. We can try, can't we? I deny that we cannot change it. I repel that cynical assumption which is born of the lethargy that comes from

poisoned air during all these years. I assert that this perversion of democracy, this robbing democracy of its virility, can be changed as truly as the system under which Walpole governed the commons of England, by bribery, as truly as the atmosphere which made the *credit mobilier* scandal possible in the Congress of the United States has been blown away by the force of public opinion. We cannot change it in a moment, but we can do our share. We can take this one step toward, not robbing the people of their part in government, but toward robbing an irresponsible autocracy of its indefensible and unjust and undemocratic control of government, and restoring it to the people to be exercised by the men of their choice and their control.

Mr. Chairman, this Convention is a great event in the life of every man in this room. A body which sits but once in twenty years to deal with the fundamental law of the State deals not only for the present but for the future, not only by its results but by its example. Opportunity knocks at the door of every man in this assemblage, an opportunity which will never come again to most of us. While millions of men are fighting and dying for their countries across the ocean, while government is become serious, sober, almost alarming in its effect upon the happiness of the lives of all that are dearest to us, it is our inestimable privilege to do something here in moving our beloved State along the pathway towards better and purer government, a more pervasive morality and a more effective exercise of the powers of government which preserves the liberty of the people. When you go back to your homes and recall the record of the summer, you will find in it cause for your children and your children's children, who will review the Convention of 1915 as we have been reviewing the work of the preceding Conventions, to say, my father, my grandfather, helped to do this work for our State.

Mr. Chairman, there is a plain old house in the Oneida hills, overlooking the valley of the Mohawk, where truth and honor dwelt in my youth. When I go back, as I am about to go, to spend my declining years, I mean to go with the feeling that I have not failed to speak and to act here in accordance with the lessons I learned there from the God of my fathers. God grant that this opportunity for service to our country and our State may not be neglected by any of the men for whom I feel so deep a friendship in this Convention.

89. THE MOVEMENT FOR ADMINISTRATIVE REORGANIZATION[1]

By F. G. Crawford

OREGON, MINNESOTA AND IOWA

The movement for consolidation of state administration began about fifteen years ago. Oregon was the first state to take up reorganization as a serious problem, when in 1909, and again in 1911 the Peoples Power League proposed a plan of state government which would centralize power in the hands of the governor. No results came from the proposals. In 1913 the governor of Minnesota appointed a commission for a study of state administration, and the legislature of Iowa created a commission for the same purpose. The Minnesota commission under Dr. Dana F. Durand, former director of the United States Census, made two reports in 1914. The final report provided for five departments, public domain, public welfare, education, labor and commerce, and agriculture. Three commissions were to be established, board of taxation, civil service, and investment. These three boards together with the commissioner of civil service and the public examiner composed a department of finance. The five departments were to be directed by heads appointed by the governor and removable at will. The commission also recommended that advisory commissions with members appointed for overlapping terms, should be attached to the departments of public domain, public welfare, and agriculture. A final recommendation of the commission proposed a budget of the executive type. This was the only phase of the work of the Minnesota commission which resulted in legislative action.

The Iowa Joint Committee on Retrenchment and Reform engaged Quail Parker and Company to examine into the conduct and expenditures of the various state offices. A final report submitted in December 1913, presented a plan for the reorganization of the state administrative offices so as to secure concentration of power and responsibility in the hands of the governor, and at the same time, more efficient and economical methods of governmental business. These reforms were to be statutory changes. Seven departments were proposed, agriculture, commerce and industry, public works, public safety, public health, education, and charities and correction. The administrative control was centralized in the governor. He was to be head of the

[1] From *Administrative Reorganization in New York State*, Copyright, 1925.

department of public safety and to appoint the director-generals of the other departments, with the consent of the senate. In the plan, the state treasurer and auditor were to be consolidated into a department of finance, and the secretary of state and the attorney-general were to be combined into a legal department.

In November 1914 the Iowa Committee made a report of its own based on the same preliminary survey but differing materially from the report of Quail Parker and Company. This report provided for the grouping of practically all of the activities of the state government in three great departments, social progress, industries, and public safety. Each department was to have a chief officer appointed by the governor. The distribution of work among the departments was arbitrary and the grouping was of such a character that results would have been almost impossible. No legislation resulted from the recommendations of either report. . . .

ILLINOIS

Eleven states of the union have put into effect a plan of reorganization and consolidation of state administration. All of these plans involve statutory changes alone and do not interfere with existing constitutional agencies. In that regard they differ materially from New York, where reorganization is projected as a constitutional change.

The first comprehensive plan of consolidation was adopted in Illinois in 1917 after an Efficiency and Economy Committee had surveyed the field of state government under the direction of Professor John A. Fairlie of the University of Illinois. A report was made in 1915 but no action was taken until Governor Lowden made administrative consolidation an issue in the campaign of 1916. The "civil administrative code" was drafted and submitted to the 1917 legislature. This code was based upon the reports of the efficiency and economy committee, but differed in that the code provided for a much greater degree of centralized executive authority. More than 100 statutory offices, departments, boards, and agencies were abolished and their functions consolidated under nine departments, namely, finance, agriculture, labor, mines and minerals, public works and buildings, public welfare, public health, trade and commerce, and registration and education. Each department has a director appointed by the governor, with the approval of the senate for a term of four years. Boards were provided to perform whatever quasi-judicial or quasi-legislative functions were included in the activities of the departments. The members of these boards were appointed by

the governor for a term of four years with the exception of the tax commission and the normal school board which are appointed for overlapping terms of six years. Advisory boards, whose members receive no salary, have been attached to the departments of agriculture, public works and buildings, labor, public welfare, public health, and registration and education for the purposes of determining questions of policy. The success of the Illinois plan has been marked. In the first five years it gave the people of the state better service at less cost; it brought together related functions in single departments; cabinet administration has been tried out successfully; it has developed unity in administration; budgetary control has been established; a division of purchases has installed centralized purchasing; and in general, unified control has resulted in better and more economical administration.

IDAHO

The state of Idaho passed their consolidation plan in 1919 as an emergency measure without a preliminary survey and investigation. Fifty offices, boards and commissions were abolished and their functions transferred to nine departments, commerce and industry, finance, immigration, labor and statistics, law enforcement, public investments, public welfare, public works, and reclamation. In 1921 the department of commerce and industry was abolished and its work transferred to the department of finance. Each department is under a single head called a commissioner, appointed by the governor and removable at his pleasure. The head of the department of immigration, labor and statistics is a constitutitonal officer appointed by the governor with senate consent for a term of two years.

In his message to the 1921 legislature, Governor Davis said in reference to the administrative reorganization that "greater efficiency, increased revenues, and reduced expenditures have justified the changes made."

NEBRASKA

In Nebraska a joint committee reported in 1915 but no action was taken until April, 1919. Governor McKelvie was elected in 1918 on that program, and the civil administrative code was passed. The code established six departments, and abolished eleven boards and commissions and ten minor agencies of state government. Eight constitutional officers and four constitutional boards were retained. The six departments are finance, labor, agriculture, trade and commerce,

public welfare, and public works. The secretary of each department is appointed by the governor for a term of two years. The 1920 revision of the constitution added four more administrative agencies and thus the administrative system includes sixteen constitutional officers and boards, six statutory boards, and six departments created by the code. Economies resulted from the operation of the code in the first three years. There has been much opposition to the concentration of authority in the governor in Nebraska, and Governor Bryan, who was opposed to the code, was elected in 1923, but no change has come as a result of the election.

MASSACHUSETTS

The reorganization movement began in Massachusetts in 1912 when a commission on economy and efficiency was created. A report was submitted in November, 1914, followed by a subsequent recommendation as to reorganization of certain agencies. The commission was abolished in 1916 and its functions transferred to a supervisor of administration. The 1917 legislature created a joint special committee on finance and budget procedure. In 1918 this committee reported to the legislature and recommended reorganization. They found 216 more or less independent agencies and recommended that they be consolidated into eleven departments. In 1918 a Constitutional Convention was held and after a detailed study of state administration, submitted to the people an amendment which provided that all executive and administrative work of the government must be organized by January 1, 1921 into not more than twenty departments. This was accepted by the voters in November, 1918. A plan of consolidation was submitted to the 1919 legislature which provided for five departments headed by constitutional officers and fourteen additional departments to include the remaining administrative agencies of the state. The departments were in charge of single heads or commissions appointed by the governor and serving for a longer term than the governor. Other proposals were made to the legislature and a committee on administration reframed the proposals into the "administrative consolidation act" which was passed Denember 1, 1919. This act created four departments under constitutional officers, secretary of the commonwealth, treasurer and receiver-general, auditor, and attorney-general; and sixteen departments, agriculture, conservation, banking and insurance, corporations and taxation, education, civil service and registration, industrial accidents, labor and industries, mental diseases, correction, public welfare, public health, public safety, public works, public utilities and metropolitan district commission. Seven depart-

ments, agriculture, conservation, corporations and taxation, education, correction, public welfare and public safety have single heads. The department of civil service is dual-headed; the department of banking and insurance is triple-headed; and the other seven departments are in charge of boards. All appointments are made by the governor with the approval of the council, an independent elective body of nine members. The terms vary from three to five years, with the members of the boards appointed for overlapping terms of six years.

By 1921 it was evident that the Massachusetts reorganization plan was not working very successfully. Governor Cox urged the legislature to appoint a commission to "ascertain whether everything possible was being done to meet the spirit of the consolidation act, whether work was still being duplicated, and whether it was possible to transact the public business better and at less expense." A special commission of thirteen members was created with Edwin S. Webster as chairman, which approached the problem of state government from the point of view of business administration. They found certain defects in the state administration and recommended that the state activities, excluding the constitutional officers, should be consolidated into nine departments with single heads, who were to constitute a governor's cabinet. The commission also recommended certain fiscal reforms which were enacted into legislation.

WASHINGTON

The 1920 special session of the legislature of Washington authorized Governor Hart to have an administrative code drafted. It was presented to the 1921 legislature, accepted, and became effective April 1, 1921. The code provides for ten departments to take the place of 69 administrative agencies abolished by the code. The ten departments are public works, business control, efficiency, taxation and examination, health, conservation and development, labor and industries, agriculture, licenses, and fisheries and game. Each of these is headed by a single officer appointed by the governor with senate approval. The ten directors with the governor, constitute an administrative board which has general supervision over the policies and methods of administration. Nine administrative committees are established composed of ex-officio members, who are largely the elective administrative officers provided for in the state constitution. The Washington plan has been successful in operation. The first year showed a saving of $1,000,000, the elimination of 474 state employees, and a reduction of 50% in the general fund state tax levy.

OHIO

In 1919, a joint legislative committee on administrative reorganization was established in Ohio. A detailed investigation was made and a plan of reorganization submitted which involved both statutory and constitutional changes, requiring the adoption of the short ballot, extension of the term of the governor to four years, and the consolidation of the administrative agencies into ten departments, state, military affairs, law, finance, trade and commerce, public works, agriculture, health, education, and welfare administration. Two commissions were retained, the industrial and public utilities commissions, and two independent offices were established, the state board of welfare, and the civil service commissioner. A definite program was drawn up in 1921, after the election of Governor Davis. This was passed by the legislature and went into operation July, 1921.

The plan, as it went into effect, does not involve constitutional changes. Before the reorganization there were fifty-one boards, commissions and agencies. Six were headed by elective constitutional officers and were little affected by reorganization. The other forty-five departments were consolidated to a large extent. The reorganization created eight main departments, made thirteen departments partially dependent upon some one of the major departments, and left fourteen departments almost wholly unaffected by the code. The eight main departments, finance, commerce, highways and public works, agriculture, health, industrial relations, education, and public welfare are administered by directors appointed by the governor with senate consent. They serve at the pleasure of the governor, with the exception of the constitutional officers. The Ohio plan centralizes power and responsibility to a greater degree, but consolidation is not as effective as might be expected.

CALIFORNIA

Reorganization in California had its beginnings in 1911 when the state board of control was established to administer effective control over the administration of the services and institutions of the state. The first plan for administrative consolidation was offered by the Tax Payers Association of California in 1919. It proposed to set up twelve departments in addition to four elective officers. This plan would have consolidated 120 departments into twelve, and reduced the list of administrative officials from 460 to 52. The legislature of 1919 failed to give the plan serious consideration. The Governor

appointed a commission in November, 1918, which reported the following spring. This report recommended partial consolidation; seventy agencies were to be placed into ten departments with nine elective officers and thirty independent offices. No action was taken on this report. In 1921 Governor Stephens sent a special message recommending the passage of a series of bills and shortly afterwards the Tax Payers' Association had a bill introduced. The Governor's bills were passed. Six departments were created, finance, labor and industrial relations, education, agriculture, public works, and institutions. The civil service commission was altered by the provision that one of the members should become a salaried executive head. The appointment of directors was vested in the governor and minor appointments made by civil service. The California consolidation has been criticised as being a make-shift which took advantage of existing departments and consisted of rearrangement of existing agencies without the abolition of many of those consolidated.

MARYLAND

Maryland began the reorganization of her government in 1916 with the establishment of a constitutional executive budget. Experience showed that the budget alone would not secure economy, and that administrative consolidation was essential. In 1920 the legislature employed the firm of Griffenhagen and Associates to make a survey. The investigation brought to light the usual situation in state governments, differing terms for state officers, eighty independent agencies, organized in a score of different ways. Later Governor Ritchie appointed a committee of 100 to make recommendations to him. The committee did not approve the report as being appropriate to the specific needs of the state. Their plan was to secure efficiency and economy without seriously deranging the existing system. The report of the commission was accepted and passed by the legislature in February, 1922, going into effect January 1, 1923. Nineteen departments were created or organized, executive, finance, law, education, board of agriculture and regents of the University of Maryland, militia, welfare, charities, health, public works, motor vehicles, conservation, public utilities, state industrial accident commission, commission of labor and statistics, state employment and registration, inspector of tobacco, state board of censors, and Maryland Racing commission. The organization of the departments varies, four types being utilized. Three departments are headed by elective officers, six by non-salaried boards with overlapping terms, five by paid boards, and five by single executives. Appointment is

vested in the governor with senate consent. The determination of the type to be used rested on the form of organization before consolidation. Maryland has adopted a decentralized system with the governor occupying the position of chief administrative officer. The plan is popular in the state and that augurs well for its success.

TENNESSEE

Tennessee was the first state of the South to reorganize her administrative machinery. The movement began in 1921 and reorganization coupled with the serious financial condition of the state became an issue in the campaign of 1922, resulting in the election of Governor Peay. A survey was made by A. E. Buck of the New York Bureau of Municipal Research and a reorganization bill drafted, as well as a plan for an executive budget. The legislature passed the act and it was approved by the governor on January 31, 1923. Eight departments were created by the code, finance and taxation, agriculture, highways and public works, education, institutions, public health, insurance and banking, and labor, each with a commissioner appointed by the governor without senate confirmation. The plan consolidates 64 disconnected offices into these eight departments, forty-nine being abolished and others retained in an advisory or investigatory capacity. The governor was made the center of the organization with real power. The reorganization plan was carried to the courts by its opponents but the Supreme Court of Tennessee upheld the law in all particulars and affirmed the right of the legislature to consolidate agencies as their judgment might determine. The decision is important in its possible influence on other states.

VERMONT

The movement for reorganization in Vermont began in 1917 when the State Board of Control was created by the legislature for the purpose of examining departments and institutions of the state government. Mr. A. E. Buck of the New York Bureau of Municipal Research was engaged by the board to make a survey of the state administration. The results of this study were submitted to the legislature in 1921 but not until two years later was the bill passed making provision for consolidation.

The law established seven departments, finance, public welfare, public health, highways, agriculture, education, and public service. About twenty-five boards and commissions were consolidated into the seven departments. Two departments are headed by single com-

missioners, four by boards, and one has a dual head. All are appointed by the governor with senate consent. The Vermont plan is not perfect but it is a move in the right direction. Outside of the plan are eleven independent boards and commissions. A long step forward in financial administration was achieved through the adoption of the administrative budget drawn up by the department of finance and the governor and through the adoption of uniform accounting and the centralization of state purchasing.

PENNSLYVANIA

Governor Pinchot was elected in Pennsylvania in 1922, pledged to clean up the "financial and administrative mess." The financial difficulties consisted of spending more than the income of the state, and for years the legislature had been appropriating more money than there was money to spend. The governor of the state has the power to veto items in appropriation bills, but that power had not been sufficient to solve the financial problems. There had been carelessness in spending the state's money by not only the politicians, but also many of the best citizens. The administrative organization had grown until it included 24 departments, 2 bureaus, 18 boards, 2 councils, 49 commissions, authorities for 31 institutions, and another official; a total of 139. Both the fiscal and reorganization plans were perfected in a single bill called the Administrative Code, (Act No. 274, Pa. Laws, 1923).

Under the administrative reorganization plan there are 15 responsible cabinet officers and three appointive commissions in addition to five elective state officials. The departments are, state and finance, justice, public instruction, military affairs, agriculture, forests and waters, labor and industry, health, highways, welfare, property and supplies, mines, banking, insurance, and state police. The three boards are, board of game commissioners, board of fish commissioners, and public service commission. The Pennsylvania plan has gone much further and has provided for a centralized purchasing plan as to standards and information, but decentralized for actual purchasing by the state institutions. The department of purchase and supplies purchases all supplies used by the legislature and departments of the state government. Salaries and positions have been standardized to secure equity in pay and position among the employees of the different departments. This power has been vested in the executive board, which is under the control of the governor.

An executive budget is included in the plan and the responsible officer is the Secretary the Commonwealth. The fiscal reforms

also provide for supervision of expenditures, allowing only 45% of an appropriation to be spent in the first year of the biennium. Sailing charts have been prepared as a guide to department heads, which show comparison from previous years, and work to prevent over-expenditures.

Pennsylvania has a comprehensive fiscal policy which works to the advantage of her reorganized administration. The governor is the centre of the government and a responsible executive. With so much executive responsibility the voters have a real problem, to make certain they secure a competent man for the governorship.

A great number of states have at one time or another discussed means and methods of reorganization of their administrative machinery. Surveys and investigations have been made by executive order, by legislative commissions, by the New York Bureau of Municipal Research, or by private individuals, and the results given to the legislature and the voters. The tangible accomplishments have varied, but in practically every case, some piece-meal changes have occurred, the state government has increased in efficiency, and the voters of the state have become more alert to the needs of the state and their responsibility to that need. The following list may not be inclusive, for in some cases this preliminary work has not been made a matter of public record: New Jersey, Oregon, Minnesota, Iowa, Delaware, Missouri, Arizona, Connecticut, Michigan, Arkansas, South Dakota, Nevada, Colorado, Kentucky, North Carolina and Virginia.

Certain principles have come to be recognized in administrative reorganization. These principles are not common to all states but in general have been the guide for investigators and students of state government. They may be summarized briefly as: 1. Departmentalization of activities along functional lines is commonly accepted. The departments should be as few in number as is possible, keeping in mind the functional basis. Certain departments are proper in every state, such as finance, education, health, charities and corrections. The rest depend on the peculiar needs of that state; 2. A second principle involves internal organization under administrative control with the proper lines of responsibility and power so that each department becomes internally effective; 3. The single administrative head is essential in all departments, except those exercising quasi-judicial or semi-legislative functions. Advisory commissions have come to be recognized as very important in the conduct of state business; 4. A fourth principle is the short ballot and the four year term for the governor and other elective state officers. The department heads when not elective are appointed by the governor

with senate consent; 5. The administrative council is an effective device which has come out of the reorganization movement. Contacts are made, the governor is subject to checks, and the result of the council is to tone up the whole state government.

In general it must be said that the principles vary according to standards and needs. In all cases where results are expected, the goal of efficiency must be ever kept in mind.

90. FOUR YEARS UNDER THE OHIO REORGANIZATION CODE[1]

By James K. Pollock, Jr.

The following article is the result of a careful survey by an impartial student, unembarrassed by previous opinions on the much discussed administrative consolidation.

Enough time seems to have elapsed to bring forth some observations on the workings of the Ohio Reorganization Code of 1921. In one sense the time is opportune for such a survey, for both Republican and Democratic administrations have operated under it. It can be called a Republican measure but it is now in the hands of Democratic officials. It is natural that the present officeholders should not hesitate to point out what is wrong with it while at the same time indicating how their administrations have been benefited by it.

In another sense, the time is not opportune for such a survey. The code has been more or less the football of politics. There is still a feeling in some quarters that it was politics and nothing else that prompted its enactment, and too frequently a person's opinions are colored by his politics. And again, it must be said in all frankness that the last two administrations, one Republican and one Democratic, can hardly be taken as fair samples. In other words, the code has scarcely had a fair chance. Mr. Davis had only a year and a half in which to get started before the end of his term, and the political controversy in which the matter was involved prevented many accomplishments in the short time. The present governor, although approving of the idea underlying the code, is lukewarm to it, and has failed to take advantage of the possibilities of further coördinating the state government under the code without legisla-

[1] Reprinted from the *National Municipal Review*, September, 1925, by permission of the editor.

tion, because he has very little interest in the constructive solution of governmental problems. Under these conditions and with these handicaps the writer has prepared the following survey.

VARIETY OF OPINIONS ON DETAILS

Considerable light can and should be thrown on the workings of the Ohio government under the reorganization of 1921. The movement for administrative reorganization is going on apace throughout the country and whatever experience is available should be utilized. The Ohio reorganization, although statutory and not affecting the constitutional arrangements, may be taken as a fair example of what can reasonably be expected in other states that contemplate such reorganizations. Perhaps it might be better to say that other states may reasonably expect to achieve at least as much as Ohio has achieved under its reorganization.

There is a great variety of opinion regarding the details of the reorganization. Scarcely anyone will claim that the code as it stands, needs no change. Most informed persons have been able to learn after four years of experience, that certain provisions of the code are wrong and should be altered. But on the other hand, there is unanimity of opinion to the effect that the general results of the reorganization have been good. Most competent observers who have served under the code or who have been in positions where they could follow its workings, agree that the present directorship principle is sound, and that the close supervision over the whole administration resulting from centralization and coördination of responsibility, has had good effect. Both governors have approved the general idea underlying the code and the great majority of their directors agree. But it has not been an unmitigated success and it gives opportunity for particular although not for sweeping criticism.

A closer survey of a number of executive departments will serve to bring out the defects as well as the good points of the reorganization. One general criticism which has been directed at the reorganization of several departments, especially the departments of public welfare, health, highways, agriculture and education, is that there cannot be the necessary continuity of policy as long as the departments are run on the principle that each governor has the right to choose his own directors. The various non-partisan organizations such as the Farm Bureau Federation, the Ohio Public Health Association, the Ohio Good Roads Federation and certain charitable organizations all base their criticisms of the reorganization code upon this one arrangement which makes the head of each department

a political head. They feel that better directors will be chosen and a more continuous and effective policy will be had if the power to appoint the director of the department is vested in some large unsalaried board whose members have over-lapping terms. This, they feel, will remove the work of the department from politics and insure more efficient administration. Several of the directors of these particular departments have joined in with this criticism, and since it constitutes the most important objection to the present arrangement, it deserves consideration.

ADMINISTRATION NOT POLLUTED BY POLITICS

There has been a great amount of talk about taking this department and that department out of politics. The assumption is that the particular department is managed on a partisan basis; that politics is interfering with the technical work of the department and thus lowering its efficiency. But upon examination of the departments whose work is largely technical or whose work should be farthest removed from any connection with partisan politics in the bad sense, namely, such departments as health, education and welfare, it is difficult if not impossible to find where the administration has been polluted with politics. According to the opponents of the present directorship arrangement, the frequency of change in the headship of the department interrupts policy and results in changing personnel. If policy were interrupted and if there were shake-ups in personnel, then the objections would be well grounded. But such does not seem to have been the case during the past four years. In the health department for instance, there have been two different directors, one a Republican and one a Democrat. Neither director was very widely known for his ability in public health matters before he was appointed, but neither director has been guilty of making a single political change in the personnel of that department. Both have been content to follow the policies laid down previously and to drift with the department. Due to their inexperience and shortness of tenure they have not been able to make many positive contributions, but they have in no sense played politics, and the department has not suffered from their incumbencies. There being no politics in the department, why is it necessary to remove the department from politics?

The criticism of politics in administration is not therefore well founded. Of course it is quite clear that the short term of the governor prevents the director of a particular department from becoming thoroughly acquainted with the work of his department so

that he can make positive contributions for its improvement. But the legislature has presented to the people for their approval in November a constitutional amendment which would extend the term of the governor to four years. If this amendment passes, the greatest objection to the code will have disappeared, because with a director in office for four years, possibly eight, he would be enabled to become as well acquainted with the work of his department as can reasonably be expected. It is very clear that the short term of the governor in Ohio has prevented many improvements that otherwise would have come with the code. The most serious obstacle to the efficient working of the code has been this short term, and if a four year term is adopted by the people of Ohio in November, 1925, most of the wind will be taken out of the sails of those organizations which now claim that the political directorship principle is bad because it does not permit of continuity of policy. . . .

NO UNUSUAL CHANGES IN PERSONNEL

In the matter of personnel, the code has had little effect. The changes in personnel have been almost the same under the code as formerly, but it is possible that the entire system has been stabilized more firmly. In several departments there have been no changes worth mentioning. In several important bureaus, there have been no changes even though there have been administrations by two different parties. The division of banks is a good illustration of this. In 1921 the Ohio Bankers' Association opposed the adoption of the code partly because it feared the shortness of the term of the superintendent of banks as proposed would disrupt the good organization and efficiency which then existed. Under two different governors of opposite politics, however, the same man has held the office of superintendent of banks. This continuity in office has been exactly what the Bankers' Association desired, and hence they have no complaint.

There has not been any reduction in the number of state employees under the code nor has there been any noticeable increase. Here and there one can discover unnecessary positions. For intance, it is sometimes suggested that the office of director of industrial relations is perfectly useless and entirely unnecessary, and might well be abolished. Certainly the work now performed by this director—very small in amount—might be taken care of by the industrial commission with as good results, and there would be one less highly paid position.

If the director of finance should carry out all the work laid out for him in the code, he would be kept busy. But under present conditions, there is not a little duplication of work as between the

auditor of state and the director of finance, and the latter has not attempted under either administration to carry out his powers to the full. Of course both the offices of director of finance and director of industrial relations were created to bring about centralized control in the hands of the governor. In the case of the department of finance this reason is sufficient to justify the creation of the position of director of finance, but in the case of the director of industrial relations the reason is not valid. If the industrial commission should be abolished and the work now performed by the commission should be given to the director of industrial relations, the position would not be a useless one. But with both the commission and the director in existence, the latter has what would be called in common parlance "a nice job."

NO IMPROVEMENT IN ABILITY OF PERSONNEL

There has been no appreciable improvement in the ability of the personnel of the state government under the code. In fact, speaking generally, and of course there are notable exceptions to this, it appears as if there has been a considerable lowering in the type of administrative talent brought into the service of the state. This fact gives justification to the statement that under a poor governor, the code is probably not as good as the old form of administrative organization. This statement is likely true as regards the ability of the personnel, even though it does not seem to be true as regards the general efficiency of the government, which has felt the quickening touch of better supervisory control. . . .

CENTRAL PURCHASE A SUCCESS

The part of the code which brought about a consolidation of the purchasing agencies of the state under one officer, the superintendent of purchases and printing, has unmistakably been an improvement over the old arrangement. In the matter of printing and in the purchase of paper there has been a great saving. In the fiscal year ending June 30, 1921, a year before the centralization of purchasing took place, the state paid out the sum of $208,338 for printing and $151,681 for paper. For the next fiscal year, ending June 30, 1926, the legislature has appropriated for printing the sum of $205,620 while the sum appropriated for paper amounted to $86,335. A saving of $65,000 a year in these two items is good proof of how the system is working. The superintendent of purchases and printing is able to buy in very large quantities and at prices lower than

wholesale, and these two factors together with the centralized supervision over the letting of contracts led to the saving mentioned. Even though centralized purchasing has been in effect for a comparatively short time, the various departments have come to learn about how much it will cost to do their printing for a year, and the sums appropriated by the last legislature for printing and paper show that for the next biennium the state will save a considerable sum of money over what it formerly spent prior to the reorganization.

Aside from printing and the purchase of paper, there are indications pointing to an improved system of purchasing the other supplies for the state, principally for the state institutions. Persons connected with the department of public welfare dissent from this, and there was considerable sentiment in the last legislature to restore to the department of public welfare the power to control its own purchases, and also the power to control the planning and erection of its own buildings, a power which is now held by the state architect under the department of highways and public works. A bill which would have done just this was passed by the house but failed in the senate. Since the purchase of most of the supplies for the state are made for the state's charitable, penal and correctional institutions, it is natural that the employees of the public welfare department should not be satisfied with an arrangement which gives to an outside officer the control over the purchase of such items as butter, flour, coal, clothing, etc. Formerly there was a much looser system for the purchase of supplies by each institution under the general supervision of an official under the board of administration. Under this former system there was a good deal of local favoritism without much regard to prices, and it seems clear that a considerable amount of this favoritism as well as a considerable amount of leakage has been eliminated by the present centralized system.

CONTINUITY IN PURCHASING OFFICE DESIRABLE

On the other hand there is no doubt about the difficulty of the task of buying for the state institutions. Undoubtedly it takes many years to learn the job. So few years have elapsed that one cannot expect full results until there is more continuity in the office of the superintendent of purchases and printing. In four years there have been three different superintendents, the present holder of the position having been in office for over two years. The first superintendent of purchases and printing started out very inauspiciously and many persons have never been able to become reconciled to the arrange-

ment even since that time, despite the fact that it can be demonstrated that large sums of money have been saved during the last fiscal year. The report of the auditor of state for 1924 says that "due to this fact (the reorganization) and the manner in which the department is operated as to purchasing on specifications and under strictly competitive bidding, it was possible, despite the increased population in the state institutions, to operate on less money than last year, meaning an enormous saving."

The strongest criticism of the present centralized purchasing arrangement is directed at the shortness of the term of the superintendent. The first director of finance who is the superior of the superintendent of purchases and printing, recommended "for the good of the service that the superintendent of purchases and printing should come within the classified civil service, an arrangement which would assure longer tenure in office and in consequence the superintendent would be more efficient and conversant with the affairs of the purchasing department and all other departments and institutions of the state."

THE POLITICAL CABINET

One of the points stressed by the proponents of the reorganization at the time of its enactment was the improvement that would be brought about by the adoption of a system which would permit the governor to surround himself with a group of men, a cabinet, which could be summoned from time to time to deliberate about the business of the state, just as the president of the United States has a cabinet which he summons for deliberation on national policies. It is interesting to find how this cabinet idea has worked under the two governors who have had the opportunity of using it. Under the administration of Governor Davis there were weekly, occasionally semi-weekly meetings, of the eight department directors with the chief executive in the governor's office. The governor's problems and the problems of the various departments were discussed, with the result that the governor was kept in close touch with all the state activities, and the different departments were afforded a closer coöperation and acquaintance with each other and in certain cases a dovetailing of the work among them. It is the testimony of those who worked under this arrangement that a considerable amount of fiction and misunderstanding was eliminated by the closer touch afforded by the system. Thus under the first governor since the reorganization, the cabinet idea worked and worked well.

Under Govenor Donahey with the exception of a few organiza-

tion meetings at the beginning of his administration, there have been no cabinet meetings, the governor preferring to call in the different directors separately to talk over the work of the state government. His reason for not calling cabinet meetings is that nothing could be accomplished through such meetings which could not be accomplished through individual interviews with the directors. He also believes that state activities can be coördinated quite as well without cabinet meetings as with them. Hence he has not used the cabinet idea. . . .

SOME PEOPLE SUSPICIOUS

The fact that the politicians are for the code makes some people suspicious. They feel that any system which puts control of the administration so thoroughly and completely in the hands of one man is not good. Perhaps they are right when the state has a poor governor. But under an able governor the reorganization code gives evidence of working a great improvement over the old system. Under a poor governor perhaps it is not any worse, because there are certain compensating advantages.

To summarize, it is clear from four years' experience that steps can be taken to improve the code. Many persons believe that the directors of health, public welfare and education should be appointed by non-political boards rather than by the governor because they feel that better directors would be selected if party politics did not enter into the choice. There is quite general agreement that the three important state commissions should have restored to them the control of their employees. The administration of the highway department demands a considerable change, and the system of centralized purchasing might well be organized on a different and more efficient basis. A four-year term for the governor will go a long way toward improving administrative conditions, and a careful check-up of the whole system will disclose some duplication and several unnecessary positions.

In general, it appears that the code's basic principles are sound, but that everything has not worked out perfectly in practice. The two-year term of the governor has militated against successful operation. It is clear that the great opportunities afforded by the code have not been utilized to the full. This has not been the fault of the code but rather the fault of those who supervise state activity. Numerous defects have been uncovered in four years, some of which have been enumerated in this paper. But when those who operate the wheels of government feel that there has been an improvement, even a financial saving which can be attributed to the reorganization, we must

come to the conclusion that in its general effect the code has been valuable. The closer supervision over the conduct of public business that has come with the reorganization, accounts for the stoppage of a great amount of leakage that existed prior to 1921. This is no small achievement, and although many ways can be suggested to improve certain details of the organization, some of which have been suggested above, this survey does not indicate that the reorganization has been a failure, but rather does indicate that it has been a qualified success.

Beard, (4th Ed.), pp. 565–591.
Mathews, pp. 242–280.
Kimball, *State and Municipal Government*, pp. 149–167.
Ogg and Ray, (2nd Ed.), pp. 701–718.
Dodd, *State Government*, pp. 248–278.

XXIII

ECONOMIC AND SOCIAL PROBLEMS OF THE STATE

The doctrines of "laissez-faire" and individualism dominated American economic and political life for generations. These principles were effective in an agricultural era, but with the development of industrialism, the growth of corporate control, and the concentration of large numbers of people in cities, they have largely broken down. Control for the protection of the individual has become essential, and this control is evidenced in the newer forms of the organization of state government. Corporate industry on a large scale has created the issues of the eight-hour day, workmen's compensation, the minimum wage, and better working conditions. The state has been forced to the position of protecting society against those who would exploit society for their own gain. In every case the state itself has legislated or created an administrative agency to deal with the situation. These forms of economic and social control have been unpopular in some quarters because they have smacked of State Socialism. Objective studies must be made to determine how to protect the worker against his friends and his enemies, for the lack of such studies is largely responsible for the weakness of our present remedial measures. The city has created the problem of housing with its attendant evils of juvenile delinquency, disease, insanity, and crime. The factory has involved industrial accidents, and workmen's compensation, and health. In every case the point at issue concerns the interests, not only of those directly affected, but also of society as a whole. To eliminate in part the need for poorhouses, for charitable and correctional institutions, and for state hospitals, is an aim of the state more worthy than that of providing for such unfortunate members of society after the damage has been done.

91. REPRESENTATION OF INTERESTS IN ADMINISTRATION[1]

By James D. Barnett

While the recognition of the various economic interests of the community was originally the essence of representative government,

[1] Reprinted from the *National Municipal Review*, July, 1923, by permission of the editor.

the modern democratic movement has resulted in nearly obliterating constitutional arrangements for class distinctions in legislative bodies, and the reappearance of the ancient principle of representation in the Russian "soviet" system has been widely regarded as evidence of political degeneration. In view of this situation it seems very remarkable indeed that this principle has been applied to an increasing extent in recent years in the organization of administrative authorities in the United States. This development has been wholly sporadic, but there are now numerous illustrations of the application of the principle in state administration.

I

In Oregon alone there is a statutory provision for the representation of various economic interests on ten state boards and one county board. Thus, three labor boards, the state board of conciliation and arbitration, the industrial welfare commission, and the state industrial accident commission, are each composed of representatives of labor, capital, and the public. The statute establishing the accident commission declares: "Inasmuch as the duties to be performed by such commissioners vitally concern the employers, the employees, as well as the whole people, of the state, it is hereby declared to be the purpose of this act that persons shall be appointed as commissioners who shall fairly represent the interests of all concerned in its administration." In addition to three *ex-officio* members, the state board for vocational education contains "one member representing agriculture, one member representing the employers of labor, one member representing the employees, and one member (a woman) representing home interests." Various agricultural interests are represented on other boards. Five members of the state board of forestry are appointed upon the nomination of the Oregon State Grange, the Oregon Forest Fire Association, the Oregon and Washington Lumber Manufacturers' Association, the United States Forest Service, and the Oregon Woolgrowers' Association. The governor and the head of the school of forestry of the agricultural college represent the state on the board. Six members of the state livestock sanitary board are appointed upon the nomination of the executive committee of the Oregon Woolgrowers' Association, the Purebred Livestock Association, and the Oregon State Dairymen's Association. The secretary of the state board of health represents the public. The state lime board consists of five members, two appointed at large, and three upon the nomination of the executive officers of the State Grange, the Farmers' Educational Co-operative Union, and the Oregon Tax-

payer's League. The state pure seed board consists of one member connected with the state agricultural experiment station, one "following the occupation of a farmer for a living," and one who is a dealer in seeds. The brand inspector of the Union Stockyards and two "practical range stockmen" make up the advisory livestock brand adjusting board. One of the thirteen regents of the state agricultural college is the master of the State Grange, and the appointive member of the county fair boards is nominated by the agricultural and horticultural societies and the granges of the county.

II

There are a number of examples of similar representation of interests on federal boards. Although the law does not recognize the interests concerned in the organization of the United States board of mediation and conciliation, the railroad labor board is made up of three members, constituting the labor group, nominated by the employees and subordinate officials of the carriers; three members, constituting the management group, nominated by the carriers; and three members, constituting the public group, representing the public.

Besides four *ex-officio* members, the federal board for vocational education contains three others, representing manufacturing and commercial interests, agricultural interests, and labor respectively. The organization of the federal reserve board was recently changed to accord with the same principle. In selecting the six appointive members, the president is directed to have "due regard to a fair representation of the financial, agricultural, industrial and commercial interests, and geographical divisions of the country."

III

Apparently the application of this principle to administrative organization aroused no opposition as an heretical departure from the policy of representation of the "public" interests alone in governmental organization until the reorganization of the federal reserve board—at first demanded only for the *agricultural* interests. Some earlier opposition has been noticed, but this has been based upon objection to the limitations of the executive in the appointment of officials for whom he is responsible. Otherwise this sort of organization has apparently been generally accepted as wholly proper. However, when the reserve board was being reorganized the principle of "class" representation involved was severely criticised. The "classes" desire representation here in order to share in the *determination of*

policies. So it was said in congress: "The federal reserve system is governed by the federal reserve board. That is to say, its policies are largely determined by the board. Therefore, agriculture, being one of the great basic industries of the nation, should have a voice in determining those policies." And, further: "When the cattle industry and the cotton industry and the grain industry are in distress and need financial aid and have to call on the federal reserve banking system, we want a real farmer on the federal reserve board to look after their interests." But this was opposed as a step in the wrong direction: "It will break down the (present) system and give support to the idea that we must have special classes represented on boards appointed under the federal government. . . . The proposal here means a breaking down of the system which has heretofore prevailed, a departure from a set policy and the establishment of a precedent destructive and un-American in the extreme." However, the reorganization was effected, and precedent in this direction was thereby strengthened.

If the representation of economic interests for *administration* is accepted, can it be logically rejected for legislation? One member of congress thought not: "The fact that the framers of the law have been compelled to concede that the agricultural interests as such require representation on the personnel of the financial agency of the country may some day lead the farmer to understand that to be truly represented he must have spokesmen whose interests are identical with his. And if he is to have spokesmen on the financial board of the government, why not in the legislative branch of the government?"

92. INDUSTRIAL CONDITIONS OF ADULT WORKMEN IN GENERAL INDUSTRIES[1]

In this section only the conditions of adult workmen are considered, leaving the questions affecting women and children for separate consideration later. The problems involved are essentially different, and the position of women and children in relation to the State may be clearly distinguished from the position of adult workmen.

WAGES

As a result of the investigations which have been made the following conclusions are justified:

[1] Adapted from Commission on Industrial Relations, *Final Report, Sen. Doc. No. 415*. 64th Congress, pp. 69–73.

1. The welfare of the State demands that the useful labor of every able-bodied workman should, as a minimum, be compensated by sufficient income to support in comfort himself, a wife, and at least three minor children, and in addition to provide for sickness, old age, and disability. Under no other conditions can a strong, contented, and efficient citizenship be developed.

2. Under existing conditions such an income is not received by fully one-half of the wage earners employed in industry.

3. The natural resources of the United States are such that an industrial population properly educated and efficiently organized can produce enough to achieve this standard of living.

4. It is probable that even at present the national agricultural and industrial output is sufficient to permit the establishment of such a standard.

5. The problem is therefore essentially one of distribution.

6. The fixing of the wages of adult workmen by legal enactments is not practicable nor desirable as a general policy, except for public employees.

7. A just standard of wages in any industry or occupation can best be reached by collective bargaining between employers and employees for the purpose of forming voluntary joint agreements. The success and justice of such joint agreements is, however, dependent upon the essential equality of the two parties and can not be attained unless effective organization exists.

It is suggested that the commission make the following recommendations:

1. In order that the public may be kept fully informed with regard to labor conditions, and that a proper basis of facts should exist for negotiation and arbitration, the Federal Government should enact the necessary legislation to provide for the collection, through the Bureau of Labor Statistics or otherwise, of the full and exact facts regarding wages, hours of labor, and extent of employment for every industry. Every employer should be required by law to file with the proper authority a sworn statement of these facts according to a prescribed form. These statistics should be published annually, and the full data regarding any industry or plant should be accessible to any mediator or any other responsible citizen.

2. Uniform statutes should be passed by the legislatures of all States requiring that wages be paid at least semimonthly and in cash, except where by joint agreement other methods are agreed upon.

HOURS OF LABOR

As a result of investigation the following conclusions are justified:

1. The physical well-being, mental development, and recreational needs of every class of population demand that under normal circumstances the working day should not exceed eight hours.

2. A very large percentage of the workmen in manufactures, transportation, and mining work more than eight hours per day.

3. This is in marked contrast to the condition of those whose economic position enables them to define the length of their own working day.

4. Practical experience has shown that the reduction of working hours is in the interest not only of the worker and the community generally, but of the employer.

5. The regulation by legal enactment of working hours of adult workmen is not generally practicable nor desirable, except for public employees.

It is suggested that the commission recommend:

1. That in the so-called continuous occupations, other than the movement of trains, requiring work during both the day and the night for six or seven days per week, the State and Federal Governments should directly intervene, so that the working hours should not exceed eight per day nor extend to more than six days per week.

SAFETY AND SANITATION

The investigations which have been made warrant the following conclusions:

1. Great progress has been made during recent years in promoting safety and sanitation in manufacturing, mining, and transportation.

2. The progress has been most rapid in the direction of safeguarding workers from industrial accidents.

3. Progress in safety has been in part the result of continued agitation and education, but has proceeded most rapidly and satisfactorily since the enactment of workmen's compensation laws, which render unsafe working conditions expensive to the employer.

4. The movement has also been largely promoted by the formation of safety committees composed of officials and workmen, and by the creation of joint conferences of employers and employees to assist and advise State officials in the administration of the law in the formulation of safety rules.

5. The campaign for safety needs, however, to be greatly extended as rapidly as possible. The annual list of accidents, approximately 35,000 fatalities and 700,000 injuries involving disability of over four weeks, can not be regarded complacently. From one-third to one-half of these accidents have been estimated by competent authorities to be preventable by proper safeguards, inspection, and control.

6. The advance in the sanitation of workshops has been less rapid because not only are the dangers less obvious, but there is no financial liability for diseases or deaths occurring as the result of improper sanitation. Future progress in sanitation demands attention not only to cleanliness and ventilation but to occupational diseases.

7. The most direct incentive for the promotion of sanitation would be the adoption of a proper system of sickness insurance.

It is suggested that the commission recommend:

1. The creation of a bureau of industrial safety (except that the section providing a museum of safety is not indorsed). Proper steps should be taken to provide for the coordination of the work of all Federal bureaus whose work is concerned with industrial safety.

2. The appropriations of the Public Health Service for the investigation and promotion of industrial sanitation should be increased.

HOUSING

It has been found in the course of the commission's investigations:

1. The present provisions for the housing of workmen are generally bad, not only in the large cities but in industrial communities of every size and in rural districts.

2. Not only are the houses and tenements which are available for workers largely unsanitary and unfit for habitation but they are inadequate, resulting in high rents, overcrowding, and congestion.

3. Such conditions make not only for discomfort and unhappiness, but for disease and degeneration.

4. The ordinary method of supplying houses through their erection by private capitalists for investment and speculation has rarely, if ever, been adequate.

5. Excellent plans for the housing of workmen have been put into effect by a number of firms and corporations, but such measures have not at all affected the general situation, and being dependent upon the volition of individuals can not be regarded as likely to greatly influence progress.

6. The tenement-house acts, as well as the health ordinances and building regulations of municipalities, while generally productive of

good effects, are at best surface remedies and can never cure the evils of the present housing situation.

7. In every important European country Government aid and direct intervention to curb speculation have proved to be necessary for the promotion of any real progress.

8. Governmental action in Europe has chiefly taken the following forms:

(a) Extension of credit to voluntary nonprofit-making associations.

(b) Construction by the Government of buildings which are leased for long periods on easy terms.

(c) Exemption from taxation and other subsidies for homes constructed for occupancy by their owners.

(d) Legislation designed to prevent the holding of land out of use and to secure for the Government a part of the "unearned increment."

It is suggested that the commission recommend:

1. The Federal and State Governments should institute investigations directed not so much to ascertaining existing housing conditions as to formulating constructive methods by which direct support and encouragement to the promotion of improved housing can be given. Actual experiment in the promotion of housing should proceed as rapidly as proper plans can be drafted.

2. Special attention should be given to taxation, in order that land should as far as possible be forced into use and the burden of taxation be removed from home owners.

3. The municipalities should be relieved from all State restrictions which now prevent them from undertaking the operation of adequate housing schemes and from engaging in other necessary municipal enterprises.

WOMEN AND CHILDREN IN INDUSTRY

The investigations and hearings of the commission justify the conclusions:

1. As a result of their unprotected condition, women and children are exploited in industry, trade, domestic service, and agriculture to an extent which threatens their health and welfare and menaces the well-being of future generations.

2. The competition of women and children is a direct menace to the wage and salary standards of men.

3. Under present conditions, children are permitted by their parents to go to work largely because their earnings are necessary for the support of the rest of the family. The restrictive legislation of

the past quarter century, although admirable in purpose and ultimate results, has thrown a heavy burden upon the fathers and mothers, who, at existing wages, have been barely able to support their families. The evidence shows that the burden of child-labor legislation has rested upon the wage earners rather than upon employers. It is the testimony of enlightened employers that the employment of children is unprofitable, and that the effect of excluding children from factories has been to increase rather than decrease profits. In the interests of society as a whole, further restrictions on the employment of immature children are necessary, but it is important that they should be made with an understanding that the burden will rest primarily upon the wage earners, whose self-sacrifice should be fully recognized.

4. The increasing employment of women has been due to two primary causes: First, the low wages of men, which have made the earnings of women necessary for the support of the family, and, second, the inducement to employers to substitute women for men because they will accept lower wages and are less likely to protest against conditions. The substitution of women for men has been greatly assisted by the introduction of improved machinery, which makes strength and technical skill unnecessary.

5. The increased employment of women under present working conditions is a serious menace to their own health and well-being, to the wages of their husbands and brothers, and to the ideals of family life upon which American civilization has been established.

6. The conditions under which women are employed in domestic service and in agriculture merit the attention of the Nation no less than does their employment in manufacturing and trade. Not only is the economic condition of women employed in agriculture and domestic service a matter of grave concern, but they are subject to overwork, unreasonable hours, and personal abuse of various kinds, from which they have been largely relieved in factories and stores through agitation and legislation.

7. The position of women in industry has been rendered doubly hard by reason of their lack of training for industrial work, by the oversupply of such labor and the consequent competition, by their traditional position of dependence, and by their disfranchisement.

8. A very thorough investigation in the New England States failed to show a single manufacturer who had left a State as a result of restrictive factory legislation. On the contrary, the majority of manufacturers expressed the opinion that the legislation regulating conditions for women and children had been advantageous to the industry as a whole, particularly because it placed all competitors upon the

same footing. Similarly an investigation of the effects of minimum-wage legislation failed to show any calculable effects upon the cost of production or upon the employment of women after a sufficient period had elapsed to allow the necessary readjustments to be made.

9. Nevertheless, there is a strong and increasing demand on the part of manufacturers in the more progressive States that regulation of factory conditions should be undertaken by the Federal Government, in order that competitors in all parts of the country should be placed upon an equal footing in this respect. The same demand comes also from the representatives of labor not only because the argument of "interstate competition" is creating strong opposition to progressive legislation, but because of the great economy of effort which would result from having to make the fight for better legislation only at the National Capital instead of in 48 States.

It is suggested that the commission recommend:

1. The recognition both by public opinion and in such legislation as may be enacted of the principle that women should receive the same compensation as men for the same terms.

2. Until this principle is recognized and women are accorded equal political rights, the extension of State protection of women, through legislation regulating working conditions, hours of service, and minimum wages, is highly desirable.

3. The increased organization of working women for self-protection and the improvement of their industrial conditions.

4. The inclusion of all women working for wages, whether in industry, trade, domestic service, or agriculture, under future legislation regulating their wages, hours, or working conditions.

5. The extension of the principle of State protection of children and the rapid increase of facilities for their education as outlined elsewhere.

6. The enactment by Congress of legislation embodying the principles contained in the so-called Palmer-Owen bill, which was before Congress at the last session.

93. THE MINIMUM WAGE LAW IN WISCONSIN[1]

INTRODUCTORY

The administration of the Wisconsin compulsory minimum wage law has been exceedingly conservative but the results have been substantial.

[1] From *State Minimum Wage Laws in Practice,* National Consumer's League, New York, June, 1924.

At the end of three and a half years the minimum wage rate is 25 cents per hour in the larger places (Milwaukee has one-half the women and children workers in the state). This rate is only 3½ cents less than the average minimum rate [2] under the Massachusetts law. The minimum rates have not greatly affected industry in general with the exception of the retail stores but they have eliminated obvious coercion in individual instances.

Particularly oppressive conditions have been removed in telephone operating, tobacco stemming, homework, etc.

There is no appreciable opposition to the law.

ANALYSIS OF THE WISCONSIN LAW [3]

Scope of law:

(a) Industries: Law covers "every person, firm or corporation, agent, manager, representative, contractor, subcontractor or principal or other person," directly or indirectly responsible for the wages of another.

(b) Classes of workers: Women and minors.

Administrative bodies:

(a) Permanent: Industrial commission, composed of three persons, appointed by the governor with the consent of the Senate for a period of six years at a salary of $5,000 annually and expenses. Has power to make investigations on its own initiative or on the filing of a verified complaint; to subpœna witnesses; to administer oaths; to compel the production of evidence; to secure punishment for contempt; to examine books, etc.; to classify occupations; to convene advisory wage boards; to fix and determine wages; to issue special licenses; to reconsider orders; and to enforce the act.

(b) Advisory: Advisory wage boards, composed of such members as will fairly represent employers, employees, and the public. No provisions as to compensation or expenses. Have power to assist the commission in ascertaining and determining a "living wage."

Method of fixing wages: Fixed by the industrial commission, with the aid of an advisory board.

(a) Basis: Women and minors must be paid a living wage, "sufficient to enable the employee receiving it to maintain himself

[2] The 14 effective Massachusetts rates averaged and reduced to an hourly basis.

[3] U. S. Bureau of Labor Statistics. *Bulletin No. 285.*

or herself under conditions consistent with his or her welfare."

(b) Procedure: Commission makes an investigation and calls an advisory board; together they determine the hours, wages, and conditions of labor; commission issues an order which becomes effective after 30 days.

(c) Reconsideration: Reconsideration is to be allowed by commission on petition of employers or employees as to the reasonableness of an order.

Appeal to courts: Allowed on the ground that the order is unlawful or unreasonable.

(a) For learners: Special licenses may be issued by the commission fixing wages.

(b) For substandard workers: Special licenses may be issued by the commission fixing wages.

Provisions in case of violations:

(a) Civil: None.

(b) Penal: Fine of $10 to $100 each day for a separate offense. Discrimination against an employee testifying is a misdemeanor—fine of $25 for each offense.

HISTORY OF THE MINIMUM WAGE LAW IN WISCONSIN

In 1913, the legislature gave the Industrial Commission power to establish a "living wage" for women and minors (ch. 712). Nothing was done under the law pending the decision of the Supreme Court of the United States (April, 1917).

In 1918, the Commission appointed an "advisory wage board" and August 1, 1919 the first minimum wage order became effective. It made compulsory a rate of at least 22 cents per hour and 21 years, and lower rates "commensurate with the ability" of learners or minors under 17 years. Boys as well as girls were covered by the law (Ch. 170, Sec. 3692, Compiled Laws of 1917) and the rulings for minors.

Although the minimum rate was low it raised wages of from one-fourth to one-third of the women employees of the State not including learners.[4] It also remedied acute conditions of underpayment in several industries.

After painstaking study the Commission standardized rates for telephone operators, established piece rates for tobacco stemming and

[4] Biennial report, July 1, 1918—June 30, 1920. (Pages 13–14.)

bean snipping, and ordering that "home workers" be paid at least the piece rates which would yield the minimum wage in the factory supplying the home work.

On August 1, 1921, on account of the increased cost of living the minimum rate was raised in cities of 5,000 or more, to 25 cents an hour. Under the new order time and a half was required for overtime work in canning factories. Employers were no longer required to make up the difference between piece rate earnings and the minimum rate, provided piece rates yielded at least the minimum wage to 75 percent of the experienced workers.

The minimum was raised to 25 cents during a period of business depression when wages were dropping. The effect was twofold. It raised wages of women who had been working at 22 cents to 25 cents an hour and it prevented wages of women working at 25 cents or more from dropping below 25 cents consequent upon the general drop in wages.

Inspection has been thorough and compliance gained without reference to the courts. In fact compliance is practically guaranteed because the Industrial Commission has power to refuse permission to employ minors under 17 years on the ground that an industry which does not pay a living wage to adult women workers is not a suitable industry for a minor to enter. In Wisconsin, industries really affected by the minimum wage law are those which employ children.

Professor John R. Commons of the State University, Madison, Wisconsin, is author of the following statement. Professor Commons originated the idea of the Wisconsin Industrial Commission (created in 1911) which administers the minimum wage law. He was a member of the Commission for several years and has always been in very close touch with its work.

RESULTS OF THE WISCONSIN MINIMUM WAGE LAW

A study of the results of the operation of the Wisconsin minimum wage law involves a number of considerations. Among them are the questions whether such a law tends to drive out industries; whether it lessens the industrial employment of women; to what extent it has raised wages; whether the women are in favor of it, and finally what type of employer backs it and what type does not. To form a sound judgment as to the results obtained however, it is necessary to review the essentials of the law itself and the circumstances surrounding its adoption and administration, in order that we may have a firm foundation for our opinions.

94. THE STATE POLICE[1]

AN EXPERIMENT IN POLICE ADMINISTRATION[2]

By Bruce Smith

The American rural police system was founded in a time when this country was a wilderness, dotted here and there with settlements and hamlets. In the course of three hundred years a fundamental revolution has taken place in the life of the people who shaped that police system to meet their needs. There are now whole states in which the density of population per square mile is equal to that of some of the oldest nations of Europe. The entire country is knit together by a network of railways and improved highways that have literally wiped out county and state boundaries. Huge industrial cities have sprung up and spread their suburban and satellite towns for miles into surrounding counties and states. Great rural sections, without becoming cities in themselves, have been transformed into densely settled industrial areas. In some of the mining sections, farms with cultivated fields cover the superficial area, while mines containing whole armies of men are developed underground.

RURAL CRIME AND PROTECTION

It is not necessary to multiply illustrations showing the radical character of the revolution wrought in American life since the establishment of our rural police system. To do this would be to document the obvious. And yet, in the midst of these revolutionary transformations, there has been no essential change in that system, except in those commonwealths that have begun to experiment with state police forces. It is in the light of these stupendous facts, and in this historical setting, that all efforts to deal with the new problems must be considered.

The sheriff-constable system, being but a rudimentary device, has failed to meet the situation satisfactorily. In some cases there has been no attempt to make it efficient. The steady infiltration of alien elements into rural sections—elements which experience has

[1] Reprinted by permission of the author, The Macmillan Co. and the editor of the *National Municipal Review.*

[2] The above article contains material taken largely from the first and last chapters of *The State Police.* This book was published September 15, 1925. The excerpts here made are covered by copyright and are printed by courtesy of the Macmillan Company.

shown and statistics prove to be especially troublesome from the standpoint of the police—has added still further to the difficulty. The sheriff and the constable have been brought into contact with a much larger number of people, native and foreign, of criminal intent or tendency, than ever before. And the prevailing system of rural police protection—the system rather than the individuals composing it—is conceded to have failed.

Responsibility for the condition which has arisen rests squarely upon the state government. Counties, towns, county divisions and districts, and the like, are created by the state for the furtherance of its own interests and as mere convenient agencies. This is especially true of the administration of justice. The criminal laws are for the most part state laws; offenders against them are arrested by officers acting for the state and in the name of the state. The sheriff and the constable, although selected by the local subdivisions of the state, have almost universally been held to be state officers. Removal by the governor or impeachment by the legislature is provided for the sheriff in a few cases. Nowhere, however, are the sheriff and the constable constituted as integral parts of the administrative machinery of the state. There is no intimate organic relationship between them, nor even closely related effort.

THE STATE POLICE AND STRIKE DUTY

In addition to these considerations relating to rural crime control, a few state police forces have at times found themselves responsible for the maintenance of order in industrial disputes. In fact, the state police have thus far been examined and studied chiefly with reference to their performance of strike duty. The resulting controversy has been long, and at times bitter. Although many questions thus raised remain still unanswered, it must be conceded that the problems there involved are social and economic, and that their solution is not a matter which can be effected by any police force, whatever its composition, direction or authority.

On the other hand, there is no disguising the fact that American communities are inclined to resent the use of outside force for the suppression of local disturbance. If all of these were able regularly to maintain order without other aid, the question might easily and satisfactorily be solved. Experience has shown, however, that actual and flagrant disorder has frequently required the interposition of the military power of the state or nation.

Where state police forces have been established, the state government has naturally employed them whenever local conditions seemed

to require its intervention. The question has therefore been squarely raised as to what restrictions, if any, should be placed upon their use.

The charge is also made that the arrival of the state police sometimes inflames the strikers to provocative acts and precipitates a conflict which their leaders are most anxious to avoid. This contention is so thoroughly reasonable as to suggest the desirability of drawing some distinction between a strike and a riot in defining the sphere of the state police. Exercise of the right to quit work when collective bargaining fails need not necessarily involve the intervention of the state. There is no reliable evidence that the state police aim to regulate strikes as such, but if their powers in this respect are to be limited at all, they might best be required to withhold their action in places having an organized police force until some overt act had been committed, and then mobilize their forces at the scene of disorder upon the order of the governor or the request of the mayor when approved by the governor.

In view of the responsibility which the state has for the protection of its citizens and their property, it is difficult to see how any further restriction can be placed upon the use of state agencies. If the state police are not employed in a grave disturbance, the militia will be, unless the state government abdicates—and so a vicious circle is created. The fact may as well be recognized that while a police force requires careful provision for democratic control, the means employed to that end must be concerned with the organization of the force and the discipline of its personnel from top to bottom, rather than with serious restrictions on its powers as a peace-maintaining agency.

THE EXTENT OF STATE POLICE FORCES

The term "state police" does not carry any precise meaning. It is frequently applied to loosely organized reserves which may be called into active service in emergency, or to subordinate bureaus concerned wholly or chiefly with the enforcement of the motor vehicle laws, as well as to police agencies which in point of fact are really county organizations. These multiform instrumentalities have been created as a means for supplementing the peace officers traditionally associated with the administration of rural government. Their special significance lies in the recognition of the fact that, in the preservation of the peace, the state government has a duty to perform, a right to defend, and that there are interests to protect which require its intervention.

We are here directly concerned only with that type of state force comprising a numerous and permanent body of police officers who are clothed with general police authority, state-wide in its extent, and regularly exercised. As thus defined this category includes the state police of Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, West Virginia, Michigan and Texas. Delaware and Maryland might also be included in the foregoing list with certain qualifications.

Taken together, these state police systems offer an inviting field to the student of police administration. They have developed in a new and favorable environment. The administrative processes have been but little influenced by other governmental agencies, and they have enjoyed direction and supervision of a kind which is all too rare in police work.

TENURE OF THE ADMINISTRATIVE HEAD

The first outstanding feature of state police systems is the tenure given to the administrative head. In actual practice the administrative head has enjoyed an official security out of all proportion to the statutory safeguards which have been provided. Although the statutes either prescribe a fixed term of four or five years, or place the superintendent completely at the will of the governor, there is as yet no indication that the principle of tenure during good behavior has been violated except in Texas. The whole organization of the Rangers is so involved that it is difficult to trace the cause of this condition with assurance. It is probable, however, that it is chiefly due to the fact that the adjutant general, a political officer, is placed in immediate charge of the force. With his retirement a large part of the force is over-turned almost as a matter of course.

In all of the other forces one may see a new tradition of public service in the making. Security of tenure for the administrative head is coming to be the accepted thing. In Pennsylvania this tradition may be said to be definitely established, with twenty years of consistent adherence to the principle to prove it. But several of the other states, notably New York, are already well past the critical stage and show every promise of duplicating the experience of Pennsylvania.

THE SCHEME OF ORGANIZATION

A second feature of the state police consists in the scheme of organization which has been followed. Although there have been cer-

tain marked departures, the organization of state police forces is generally characterized by extreme simplicity. Subordinate bureaus and divisions have been so limited in number that actual supervision by the administrative head is quite within the range of possibility. Activities which are necessarily separate and distinct are so grouped and correlated that immediate supervision can be affected by a bureau chief.

The administrative head cannot become involved in adjusting the complex interrelation of daily activities without surrending to routine in the end. When that surrender takes place the administrative head ceases to be a leader and becomes merely a cog in the machine. Further down in the official hierarchy the number of subordinate units may be increased, until, at the very bottom, where the units to be supervised are not activities but individuals, they may reach a considerable number. But at the top, the lines of authority converge upon a mere half-dozen men, or an even smaller number, who report directly to the administrative head. The latter is left free to experiment and test, to adapt and to apply various means to a given end. Intelligent leadership may thereby be made effective.

UNIFIED AND RESPONSIBLE CONTROL OF PERSONNEL

It is in the matter of the control of personnel that the state police have most clearly departed from accepted methods. Here is a group of police forces, in the service of a considerable number of representative states, which has broken completely with the civil service commission tradition. The power of a superintendent of state police is as broad as the formal responsibility which is placed upon him. He can hire and he can fire according to standards which are the product of his experience. Formal tests for him are merely a means to an end. They represent tentative measurements of personal capacity. What he wants, and what he must at all costs have, is a body of raw recruits whose character, intelligence, education and experience are such that with capable direction, with training and discipline, a reasonable proportion may be fashioned into competent policemen.

Most state police administrators exercise equally extensive powers with respect to disciplinary action and dismissals. Experience with American police forces has amply demonstrated for us the destruction of discipline and morale which follows any division of responsibility in this matter. It requires but one or two reversals of the judgment rendered by police authorities to make the rank and file understand where the real power and control is vested, and when

that realization comes, the police administrator finds his prestige materially weakened. The agency which pronounces the last word in disciplinary cases wields the preponderating influence.

Let us by all means have continuity of police service, but let that principle of continuity be applied first of all to the administrative head. If he is surrounded by suitable safeguards for security of tenure, there need be far less concern over the protection offered to his subordinates. If he is relieved from the continuous pressure of political influence, he can more readily be entrusted with the power to make and remake the police force to meet the demands placed upon it. There will then be ample security for the capable policeman, and no security whatever for those who lack capacity for the work.

RESISTANCE TO POLITICAL INFLUENCE

Politics and the police most usually present a thorny question. One might well hesitate to draw sweeping conclusions relating to such an ill-defined subject from what might appear to be insufficient data. Moreover, the environment in which the state police experiment has been conducted probably is more favorable than that which surrounds the police department of a large city. Political influence has been somewhat more remote. Nevertheless, administrative heads of even the most successful state systems can testify that powerful political pressure has been brought to bear upon them from time to time. In some of the older forces such efforts to influence the administration of the state police appear to have proved unavailing so consistently that the administrators' hands are now entirely free.

The manner in which political pressure has been resisted in Pennsylvania, New York and Massachusetts is especially striking. In New York, for example, the first superintendent promptly tendered his resignation to the governor a few days after his appointment as a protest against interference with the preliminary stages of organization. His resignation was not accepted, the interference ceased abruptly, and the contest between political patronage and administration was half won then and there. In Pennsylvania the regulations of the force provide that "any member of this force known to have used outside influence for the furtherance of his interests will be considered as acknowledging his incompetence and will be dropped from the service." Necessity for application of this rule has arisen but once. The action of the superintendent upon that occasion was so prompt and vigorous that the offense has never been repeated. The commissioner of public safety in Massachusetts recently de-

clined to grant promotion to a member of the force on whose behalf political intercession had been attempted. In this case the commissioner had already decided to promote the aspirant in question. There was nothing to connect him with the political pressure which had been brought to bear on his behalf. But the commissioner ruled that the integrity of the force was at stake—that the matter was one of administrative principle which must be closely adhered to.

Illustrations of this general character have been duplicated again and again, not only in the states here cited, but in several of the others. In the light of our experience with the management and control of police forces, they acquire a special significance. Such things do not happen by accident in police circles. It therefore seems reasonable to attribute them to the superior type of organization which these forces have enjoyed, to the principles of administration upon which they have been founded, and to the character of the administrators who have been attracted to the service.

SIGNIFICANCE OF THE EXPERIMENT

Success in police administration depends upon sound organization and capable direction. It cannot be secured by compounding inferior methods with good intentions, nor by any of the customary safeguards against political control. It has been demonstrated repeatedly that a police force cannot be taken "out of politics" unless the responsible head is also taken out of politics. But the lessons of this experience even yet have not been learned. Some communities seem even to have ceased trying to fashion their police departments into dependable public agencies. They seem to have concluded that there is some necessary conflict between our democratic institutions and efficient police service. Nothing could be further from the truth. For while we have admired the achievements of continental police systems, very few have realized that there was a necessary connection between the opportunities which they have offered to intelligent leadership and the results which have been secured. The general assumption has been that the methods employed in western Europe, in Australia, in South Africa, and in British North America could not be successfully employed under our own governmental institutions. The state police have proved that this is not the case. Having broken away from our own police tradition, they have adapted tried and tested principles to American conditions. And there, in the last analysis, lies the administrative significance of the experiment which they have conducted.

THE FUTURE OF STATE POLICE

Forecasts are always dangerous and yet when they are based on observed tendencies they may be interesting if not useful. The changes in the conditions of rural life here described are likely to be accelerated rather than retarded in the immediate future. Fine highways will multiply and the use of the automobile continue to increase. The specialized criminal who has already appeared in the country-side will doubtless be seen more often in villages and in quiet lanes. Meanwhile, inevitably, the law-enforcement problems confronting the sheriff and constable will grow to larger proportions and become still more baffling to those officers. This much seems undebatable.

In a state police system, several of our commonwealths have sought to find a force adapted to the new conditions. From an administrative point of view, the organization and management of these forces show in general a decided improvement over municipal police agencies. From the social point of view a number of serious questions have been raised, and a few of the states have attempted to answer them by placing certain restrictions upon the use of state police on strike duty. It is not improbable that if the labor controversies involved in this phase of modern policing are fairly faced by all parties and the rural law-enforcement problem is considered on its merits, a technique and correct procedure for dealing with the maintenance of order in the disputes of capital and labor can be evolved. That this will not be done by avoiding the obvious or concealing the difficult, is certain. When that is accomplished, the way will be clear for the development of agencies competent to meet all the requirements of rural patrol. If after longer experience the verdict of history is to the effect that the state police are not the proper agents to deal with the new social order of the country, the problem of rural crime in the new conditions will have to be faced in some other fashion. If, however, the verdict runs to the contrary, and an organized state police force with defined jurisdiction and accepted procedure is found to be the right agency to meet the law-enforcement issues of the new time, then the experience of the state police bodies here briefly described will offer guidance for the legislators and administrators of the future.

Beard, (4th Ed.), 672–699.
Mathews, pp. 344–408.
Kimball, *State and Municipal Government*, pp. 168–193.

XXIV

STATE FINANCE

DUTCH ORIGIN

During the agricultural era the general property tax was developed as the main source of state government revenue. This change in the source of income from tangible to intangible property has brought with it demands for a change in the sources of taxation. In New York State, for instance, about 70 per cent of the taxes are collected from real property, although this form of wealth constitutes only 50 per cent of the total. The result has been the adoption of new forms of taxation, such as the income tax, inheritance tax, corporation tax, gasoline tax, etc., to meet the new demands. These new forms have placed the burden of tax collection upon the state government. The general property tax is a local matter, assessed and collected by the town or county unit. With the increase in amount of the general property tax, inequitable assessments have created problems which have been clarified but not solved by the publication of lists, equalization, and instructions to assessors. Scientific methods of assessment have been developed but not generally applied, and the solution of real property assessment lies in the scientific determination of equitable valuations of all property. The tax problem is thus put squarely up to the state, in the collection of the newer taxes and in the accomplishment of the scientific assessment system.

State expenditures have mounted by leaps and bounds with the increased demands for services such as highways, education, and industrial control. The older haphazard method of appropriations has given way to the budget system. Certain states had a budget before the national budget system was adopted, but the more recent state budgets have been greatly influenced by the executive type used by the national government. The budget has not decreased state expenditures, but it has served to make these expenditures more effective.

95. THE DEVELOPMENT OF THE NEW YORK STATE TAX SYSTEM[1]

The tax system of the State of New York is the result of three hundred years of history on this continent. The Dutch who settled

[1] From *State of New York Special Joint Committee on Taxation and Retrenchment Report,* 1921, Legislative Doc. No. 57. Albany, 1921, pp. 11–17.

and controlled New Amsterdam and New Netherlands, which now form New York State, were primarily traders. New Amsterdam was the distributing center for goods imported from Holland. It was the key to the trade of the Hudson Valley and lay as well on the direct route from New England to Virginia. It was only natural under these conditions, for the public revenues to be derived from indirect taxes, from duties on import, export and tonnage, and from excise, a plan which was adopted the more readily as this policy was extensively developed in the mother country at the time. Direct taxes were resorted to only when the revenues derived from these indirect sources became deficient. When this became necessary, the effort was first made to solicit voluntary contributions from "each according to his condition," and when this proved only partly successful, definite individual quotas were assigned, and payment was made compulsory for the "disaffected or ill-disposed persons." This system of contributions and assessed quotas gradually developed into a direct tax on the person, his ability to pay being measured by his property. This development was practically completed by 1654, when Peter Stuyvesant secured from the home government authority to lay and collect "an honest and fair tax upon real property, as land, houses or lots, and milch cows or draught oxen."

ENGLISH INFLUENCE

The influence of the English was very pronounced in the early development of the New York tax system. Throughout New England direct taxes were customary from the earliest days. In developing the direct property tax as a new source of revenue, the New Amsterdam Dutch were unquestionably following the lead of the English colonists. In 1650 Secretary Von Tienhoven studied the New England taxes and reported that "all the property and means of the people, as well of the highest as of the lowest, were appraised by the magistrates and taxed, according to each man's ability, for the payment of the governor, deputy governor, magistrates, secretaries, marshals, constables, military officers, ministers and schoolmasters, for the erection of churches, schoolhouses and town edifices, for the repairs of bridges, for the erection of ordinaries for travelers of the University of Boston, for the support of the General Assembly and of the General Court." A further evidence of the influence of the New England colonists is to be found in sections of Long Island settled largely from Connecticut and Massachusetts Bay in which direct property taxes were in force many years before New Amsterdam was forced to adopt them.

UNDER THE COLONIAL ASSEMBLY

With the establishment of the Colonial Assembly in 1683, the general property tax became a recognized part of the tax system of the colony, and while it was relied upon only occasionally by the colonial government, it became a regular annual source of revenue for a number of the local units. In New York city and in several Long Island towns the assessment rolls from this period are still preserved. The direct property tax was, however, of comparative unimportance until well along in the eighteenth and nineteenth centuries. In New York city, for example, toward the end of the eighteenth century, the bulk of the revenues were received from the rental of city-owned property—docks, market, ferry, slaughter-house, water-lot, land, rope-walk, powder magazine, derrick, weigh house, and brick-yard. Very considerable amounts were collected from tavern licenses and from fines and fees, the bulk of which went directly to the officials in lieu of salaries. Before the English control of the city, large revenues were derived from the sale of the freedoms of the city which were made a condition of doing business in the city.

EFFECT OF FEDERATION

The Revolution and the establishment of the Confederation made little immediate change in the tax or revenue system of the state or its local divisions. The New Federal Constitution, however, introduced a very important factor in that it deprived the state of the right to collect import, export and tonnage duties, and opened the way for federal internal revenue taxes in competition with the state and municipal levies. The result of this was to force the states and the cities to rely more extensively upon the direct property tax. The outstanding difficulties of the general property tax became apparent as soon as it was utilized to any considerable extent, and many and varied efforts were made in the effort to secure impartial assessments, the full disclosure of personal property and fair equalization.

ECONOMIC DEVELOPMENT

The development of the State of New York was tremendously rapid after the close of the War of 1812. The increase of population between 1810 and 1830 was phenomenal, especially in the agricultural regions. By 1840 two-thirds of the population was en-

gaged in agriculture, and the state ranked first in the Union in the production of barley, oats, buckwheat, hops, potatoes, hay and wool. The milling industry was centered in Rochester and Oswego until the middle of the century when it was drawn by western wheat to Minneapolis and St. Paul. Manufacturing plants sprang up as if by magic until New York overtook and surpassed Pennsylvania and Massachusetts by 1830. The textile industry and the factory system were just beginning in 1812. By 1840 there were 323 woolen mills and 117 cotton mills, and home industry was very extensive. The development of means of communication was also marked. Over 350 turnpike and bridge companies were created by the Legislature from 1799 to 1819. Private canals and later State canals were constructed, so that by 1840 there were 840 miles of canals. Steam navigation, beginning with Fulton's experiment of 1807, was commercially successful by 1814, and was rapidly extended after that time. Steam railroads, which were first constructed in 1831, made such progress that by 1840, 575 miles of track had been completed.

The development of the State was continued with even greater vigor during the succeeding years. While the West took the leadership from New York in agriculture and in the milling industry, the tremendous growth of our urban centers and the development of modern manufacturing have been so phenomenal that the State of New York is now the financial and commercial center of the country and exerts an important influence in international finance.

NEW WEALTH

As a result of the forces that we have just outlined, the State of New York developed from a sparsely settled agricultural and trading settlement to a densely populated industrial and commercial State. In the transition new types of wealth have been created; enormous reservoirs of intangible personal property and tremendous corporations have arisen; public franchises have come into existence; the entire banking system has been erected. Parallel with this development there have been no less startling social changes. The industrial era and immigration have created a large class of wage earners, while the development of corporations with their staffs has created a new prosperous but salaried class. Political changes of importance have naturally occurred. The property qualification for voters has been abolished and more recently women have been admitted to the suffrage. The vast extension of the direct and regulatory services of State and local government have not only increased the demand

for public revenues, but have also changed the character of government.

EFFECT ON TAX SYSTEM

These economic, social and political changes have resulted in a gradual development of the tax system of the State. The original general property tax was gradually expanded as new types of property developed. When corporations arose, the effort was made to tax them just like individuals. Intangible personal property, represented by stock, bonds and mortgages, was treated like horses and cattle as far as taxation was concerned. When the new salaried and professional classes arose, the effort was still made to distribute the tax burden on the basis of property ownership though these groups held almost no property.

From time to time changes were made in the tax system to fit it to the new conditions. In 1823 corporations were specifically recognized for purposes of taxation, and were to be assessed for their real estate and capital stock. In 1853 it was also provided that corporate surpluses should be taxed. In 1860 and 1881 very extensive changes were made in the tax system as a means of requiring the corporations to pay a greater share of the tax burden. The annual franchise tax on corporations was imported from Pennsylvania in 1880 and as a part of the same tax reform movement franchise taxes were placed upon transportation, transmission and insurance companies. The franchise tax upon public utilities and elevated railroads was added in 1896. The inheritance tax first went into effect in 1886. In 1899 the tax on special franchises was established as a result of Governor Roosevelt's personal pressure upon the Legislature and the public demand for the adequate taxation of the right to use the streets. The bank stock tax enacted in 1901 removed bank stock from taxation under the general property tax. In 1905 the same policy was adopted with regard to mortgages, and a recording tax was established in place of their taxation as personal property. The next significant change in the State tax system came in 1917 with the establishment of a tax on manufacturing and mercantile corporations based upon their net income in lieu of personal property and capital stock taxes previously imposed under the general property tax. In 1919 this tax was extended to include all domestic and foreign corporations except those already taxed under certain other provisions, holding companies and real estate companies. In 1919, through the efforts of this committee, the personal income tax was adopted.

REVISIONS TO MEET CHANGING CONDITIONS

It will be seen from this brief outline of the development of the State tax system that the effort has been made throughout the entire process to revise the tax system to meet the changing social and economic conditions of the State. New taxes have been devised to meet new kinds of property or to reach new social groups and thus to secure a fairer distribution of the growing burden of taxation. At the beginning of the history of the State, the general property tax met the needs of the State in a fairly satisfactory manner, but as the State developed various kinds of property were removed from its operation and taxed under special laws because the general property tax could not meet the needs of an industrial and commercial community.

Your Committee presents this summarization of the evolution of the State tax system because it is these same forces and these same motives which led it, in 1919, in spite of much opposition from those with extensive experience in State and municipal tax problems, to recommend the enactment of the personal income tax. Your Committee was convinced that the social and economic changes of the past generation in this State had rendered the general property tax an inadequate means of measuring the ability of individuals to contribute to the support of their government, and that therefore, the only rational course open to the Committee was to urge the enactment of the personal income tax.

96. STATE AID AND THE INCREASE OF STATE EXPENDITURES[1]

What effect has state aid had upon the growth of state expenditures? This question inevitably arises as the result of the preceding chapters. To answer this question intelligently and to present a true picture of the growth of state expenditures since the war, the following facts are presented.

GROWTH OF BUDGET EXPENDITURES

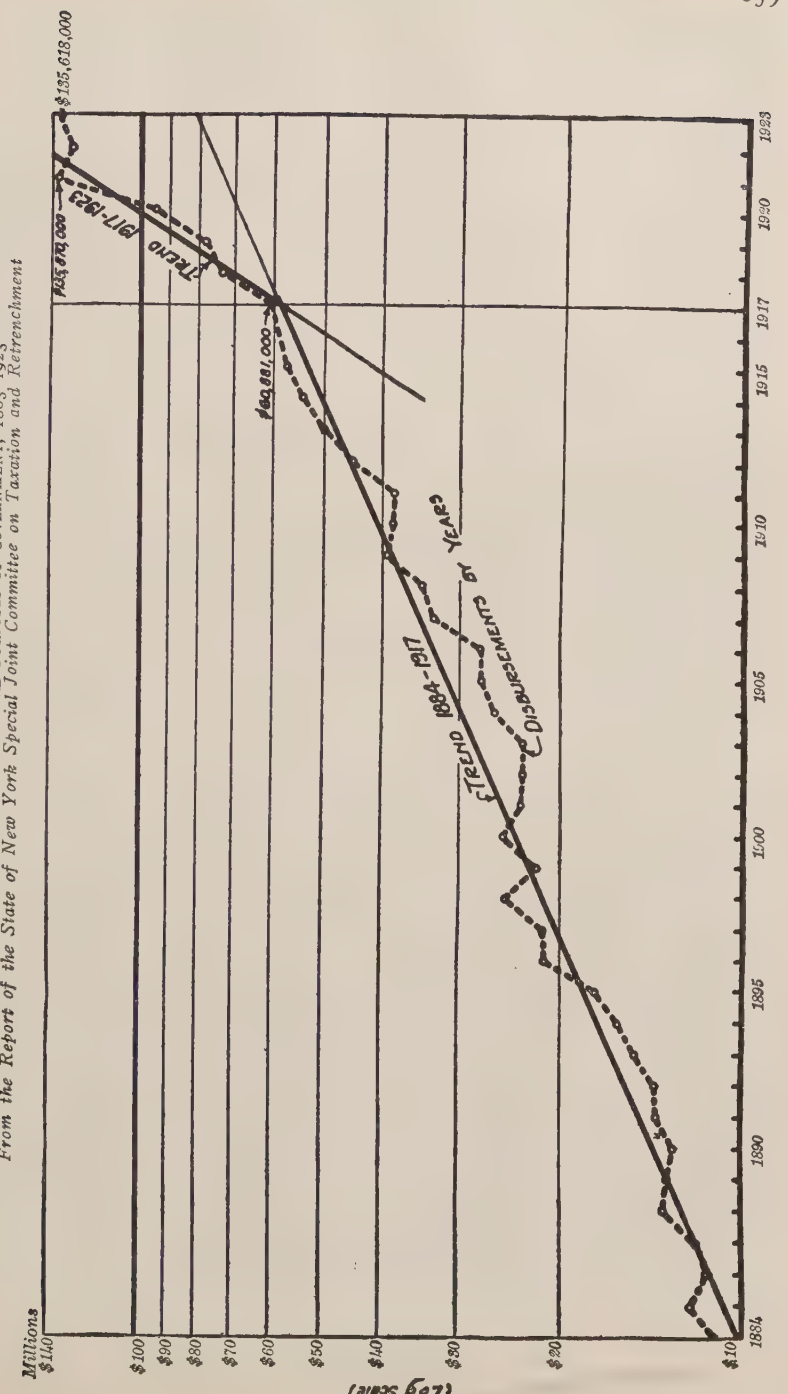
During the six years ended June 30, 1923, the total ordinary general budget expenditures of the state of New York increased from $61,000,000 to $132,000,000 per annum. In other words, the cost of

[1] Adapted from *State of New York Special Joint Committee on Taxation and Retrenchment*, 1925, pp. 123–154.

CHART I

TREND OF STATE DISBURSEMENTS FOR GENERAL PURPOSES OF GOVERNMENT, 1883–1923

From the Report of the State of New York Special Joint Committee on Taxation and Retrenchment



state government more than doubled within the space of six years.

Large as this increase appears when viewed by itself, it is by no means without a precedent in the financial history of the state. A more rapid increase occurred during the Civil War when state expenditures tripled within a period of three years. Even as regards periods unaffected by war-time influences, it will be found that there is nothing abnormal about increasing state expenditures. The trend of governmental costs has always been upward. At the beginning of the nineteenth century the total expense of carrying on the state government was less than $300,000 per annum. By 1860 expenditures had increased to over $3,000,000 per annum and by 1870 they were running at the rate of about $10,000,000 per annum.[2] Chart I, which depicts the trend of state disbursements for general purposes during the last forty years, shows a steady increase in expenditures throughout the three decades preceding the World War,[3] the normal rate of growth during this period being about 5 per cent per annum.

Since the fiscal year ended June 30, 1916, comprised only nine months, the disbursements for that year have been omitted in computing the trend from 1884 to 1917.

Commencing with the fiscal year 1918, however, there was a sharp departure from the previous trend and during the next four years disbursements began suddenly to grow at the rate of 20 per cent per annum. The peak was reached in the fiscal year ended June 30, 1921, when expenditures for general purposes of government showed an increase of 123 per cent over those for 1917. Since 1921 there has been no further increase, but governmental expenditures have not receded appreciably, and in 1923 were still 116 per cent above their 1917 level.

[2] See "Financial History of New York State" by Don C. Sowers, *Columbia University Studies in Political Science,* Vol. LVII, Number 2, Appendix I.

[3] Chart I is based on data taken from the Annual Report of the Comptroller for the fiscal year ended June 30, 1923, p. 249. "Disbursements for General Purposes of Government" differ slightly from "Expenditures for General Purposes of Government" as used elsewhere in this report in that the former include amounts expended for the redemption of temporary loans and certain advances made by the state but subsequently refunded.

The disbursements for each year have been plotted on a ratio scale. Consequently equal percentage increases in disbursements are represented by equal vertical distances on the chart. The slopes of the straight lines which have been fitted to the curve by the "method of least squares" represent the respective normal rates of increase for the periods covered. The equations of these lines are respectively

$$\log y = .022393x \text{ plus } 7.011155$$

and $$\log y = .080544x \text{ plus } 5.111803$$

EXPLANATION OF RECENT INCREASE

Various explanations are currently given concerning the underlying causes for the recent rapid increase in state expenditures. Among those commonly put forward are "depreciation in the purchasing power of the dollar," "governmental waste and inefficiency," "the extravagant issuance of tax-free bonds," "unwarranted increases in the number of state employees" and "the undue multiplication of state commissions and regulatory bodies." Your committee is of the opinion that exact knowledge is needed concerning the real causes for the increase in question, not only to correct many current misconceptions, but in order to supply a necessary background for the intelligent consideration of the tax problem in New York State. The following section, therefore, is devoted to a detailed analysis of the increase in state expenditures for the fiscal year ended June 30, 1923, as compared with the year ended June 30, 1917, with a view to ascertaining how much each class of expenditure has increased as between the two years in question and what were the actual causes for the increase in each particular case. More specifically we wish to show how much of the $71,000,000 increase in expenditures which took place between 1917 and 1923 was actually due to the depreciated purchasing power of the dollar; what other causes have been operative to increase expenditures; and finally, whether the state is expending its income less efficiently than heretofore.

EXPENDITURES DEFINED

The data utilized by the committee in making its study have been in large part obtained from the annual reports of the state comptroller. The accounts of the comptroller are kept on a cash disbursement as distinguished from an accrual basis. Expenditures as here used, therefore, mean cash expenditures. The results of the study would have had more significance had it been possible to make an analysis of expenses and liabilities actually incurred, instead of merely cash payments. This was unfortunately not possible on the basis of existing state records.

From the viewpoint of taxation, expenditures are chiefly important in relation to their effect upon the general tax burden. Since this is the viewpoint from which the present study was undertaken, it was desirable that consideration be limited to those expenditures which had a direct influence in the determination of the amount to be raised by taxation. As classified in the accounts of the state comptroller, the expenditures most nearly conforming to the above de-

scription were the so-called "expenditures for general purposes" which were accordingly used.

Expenditures for general purposes may be defined as all state expenditures defrayed out of general revenues. Expenditures paid for out of the proceeds of the sale of bonds are, therefore, excluded. The expenditures to be analyzed comprise the current expenses of government, fixed charges and contributions, and capital outlays paid for out of general revenues. They represent actual cash disbursements except as regards contributions to sinking funds for interest and amortization of funded debt and contributions from general revenues for canal construction. In these cases, expenditures mean the amounts transferred from the general fund to the special sinking and construction funds involved.

The reports of the comptroller classify expenditures by governmental functions, by character, by administrative units and by object of expenditure. From the standpoint of the analysis which it was desired to make, these classifications were in some respects inadequate. However, since a reclassification would have been exceedingly difficult if not impossible on the basis of available data, the comptroller's classifications have been used throughout with two exceptions. These are (1) the treatment of contributions made to sinking funds for interest and amortization of debt as a separate classification, and (2) the shifting of contributions made to the canal fund for construction from the classification "fixed charges and contributions" to the classification "capital outlays." Both of these changes were made merely for the special purpose in view.

GROWTH OF EXPENDITURES FOR GENERAL PURPOSES

The following table shows the growth in expenditures for general purposes of government between 1917 and 1923:

TABLE XXXI

EXPENDITURES FOR GENERAL PURPOSES

FISCAL YEAR ENDED JUNE 30	Total expenditures	INCREASE OVER 1917	
		Amount	Per cent
1917	$60,881,298	.....	.....
1918	73,142,571	$12,261,273	20.1
1919	78,341,313	17,460,015	28.7
1920	93,924,215	33,042,917	54.3
1921	135,608,175	74,726,877	122.7
1922	126,669,172	65,787,874	108.1
1923	131,868,672	70,987,374	116.6

As has already been noted, the fiscal year 1917 was the last year in which expenditures increased at a rate which approximated the normal rate for the thirty years preceding the World War. The following period was characterized by the sharp upward movement which it is proposed to explain. The culmination of this movement was reached in 1921, but since expenditures have not notably decreased since then, and since moreover, the 1923 figures are the latest available, the committee has considered that a detailed comparison of expenditures for 1923 as against 1917 would have more value for the purpose in view than a comparison of expenditures for 1917 and 1921.

ANALYSIS OF EXPENDITURES BY CHARACTER

Table XXXII supplies interesting information concerning the character of the items which were mainly responsible for the seventy-one million dollar increase in state expenditures as between the fiscal years 1923 and 1917. Over half of the aggregate increase was attributable to fixed charges and contributions which experienced a growth of 271 per cent during the period under review. Fixed charges consist for the most part of grants and subventions determined by legislative enactment. They are but indirectly affected by a changing price level. The fact that they contributed the major share of the total increase in state expenditures is therefore of considerable significance.

Expenditures for administration, maintenance and operation, which represent the current expenses of government, increased only 55 per cent during the period under review and were responsible for about 27 per cent of the total increase in governmental disbursements. Capital outlays exhibit the greatest percentage increase over 1917, viz., 589 per cent, but due to their relative unimportance, they were responsible for only 19 per cent of the aggregate increase under consideration. Expenditures for state debt service (interest and amortization charges) show a growth of less than 15 per cent over 1917 and contributed but 2 per cent of the total increase in state expenditures.

TABLE XXXII

INCREASE IN EXPENDITURES FOR GENERAL PURPOSES, FISCAL YEAR 1923 OVER 1917—ANALYSIS BY CHARACTER

	EXPENDITURES 1917		EXPENDITURES 1923		INCREASE 1923 OVER 1917		
	Amount	Per cent to total	Amount	Per cent to total	Amount	Per cent to total	Per cent increase 1923 over 1917
Administration, maintenance, operation	$34,364,766	56.4	$53,457,029	40.5	$19,092,263	26.7	55.6
Fixed charges and contributions	13,705,276	22.6	50,733,461	38.5	37,028,185	52.3	270.2
Debt service	10,548,309	17.3	12,079,062	9.2	1,530,753	2.2	14.5
Capital outlays	2,262,947	3.7	15,599,120	11.8	13,336,173	18.8	589.3
Total	$60,881,298	100.0	$131,868,672	100.0	$70,987,374	100.0	116.6

ANALYSIS BY GOVERNMENTAL FUNCTIONS

Table XXXIII analyzes the increase in state expenditures as between 1917 and 1923, according to governmental functions. The data for this table have been obtained from the annual reports of the comptroller, but in order to place the figures for the two years on a more comparable basis, some modifications have been made in the comptroller's classifications. These changes include the deletion from 1917 legislative expenditures of some $370,000 representing the cost of printing department reports. This cost was not

TABLE XXXIII

INCREASE IN EXPENDITURES FOR GENERAL PURPOSES, FISCAL YEAR 1923 OVER 1917 —ANALYSIS BY FUNCTION [1]

FUNCTION	1917	1923	Increase + Decrease —	Per cent of gross increase	Per cent Increase + Decrease —
Executive	$133,876	$108,190	— $25,686	....	— 19.2
Legislative	1,800,609 [2]	1,531,965	— 268,644	....	— 14.9
Judicial	2,284,628 [3]	2,351,010	66,382	.09	2.9
Administrative and regulative	4,940,994 [4]	8,449,573 [5]	3,508,579	4.83	71.0
Educational	9,654,666	42,515,426	32,860,760	45.32	340.4
Agricultural	2,569,761	6,448,328	3,878,567	5.34	150.9
Defensive	2,768,257	2,807,291	39,034	.05	1.4
Penal	1,946,722	3,065,592	1,118,870	1.54	57.5
Curative	8,071,319	14,440,528	6,369,209	8.78	78.9
Charitable	3,773,054	5,109,548	1,336,494	1.84	35.4
Protective	1,828,950	3,104,988	1,276,038	1.76	69.8
Constructive	6,614,807	22,035,728	15,420,921	21.25	233.1
General	930,889	1,549,276	618,387	.85	66.4
Canal maintenance	1,722,570	3,805,167	2,082,597	2.87	120.9
Canal construction	.....	2,467,000	2,467,000	3.40	.....
State debt service	10,548,309	12,079,062	1,530,753	2.11	14.5
Not classified [6]	1,291,887	.....	— 1,291,887	....	.....
Total	$60,881,298	$131,868,672	$70,987,374	....	116.6

1 From *Annual Report of Comptroller*, Fiscal Year ended June 30, 1923, p. 260.
2 Excludes $373,086 representing cost of printing departmental reports not charged to legislative function in 1923.
3 Excludes $918,801 representing judgments in stock transfer tax cases.
4 Excludes departments of weights and measures and foods and markets which have been classed with agricultural function, because subsequently absorbed by that function.
5 Excludes $3,422,338 representing expenditures on New York-New Jersey Vehicular Tunnel. These expenditures have been classed as constructive.
6 Comprises judgments in stock transfer tax cases and undistributed cost of departmental reports. See notes 2 and 3.

classified as a legislative expense in 1923. Another deletion of some $900,000 has been made from the 1917 expenditures of the judicial function. The deleted items represent judgments assessed against the state in stock transfer tax cases and have no counterpart in 1923 expenditures. During the period under review a number of activities were transferred from the administrative to the regula-

tive branch, and since it is difficult to segregate the expenditures relating to these transferred activities, administration and regulation have been treated as one function on the table. The only other modification of importance is the transfer from the regulative to the constructive function of expenditures applicable to the construction of the New York-New Jersey vehicular tunnel.

It is worth noting that the combined cost of carrying on the executive, legislative, judicial and defensive branches was actually less in 1923 than in 1917. On the other hand education cost the state over four times as much in 1923 as in 1917 and contributed 45 per cent of the gross increase in state expenditures as between those two years. Construction also added heavily to the state's costs. If expenditures for canal construction and maintenance are classed with this function, as they properly should be, it will be seen that the constructive arm was responsible for over 27 per cent of the gross increase in state expenditures as between the two years under comparison. The reasons for these heavy increases will appear in the following sections of the report. . . .

. . . . . .

GENERAL SUMMARY AND CONCLUSION

Your committee concludes from the foregoing analysis that the increase of $71,000,000 in state expenditures between 1917 and 1923 was not due to waste and extravagance. Moreover, it was not predominantly the result of a higher price and wage level. Broadly speaking, there were four main causes for the increase which, in order of their importance, may be stated as follows:

1. Increased state aid granted local political units for educational and highway purposes.

2. The effect of a higher price and wage level.

3. The policy of financing the major portion of permanent improvements out of current taxes instead of through the sale of bonds as heretofore.

4. An increase in the variety and volume of services rendered by the state.

A brief statement of the more important increases attributable to the above is furnished by Table XLIV.

TABLE XLIV

SUMMARY OF PRINCIPAL INCREASES IN STATE EXPENDITURES FISCAL YEAR, 1923 OVER 1917

Increase in Current Governmental Expenses		
Estimated increase due to rise in salary and price level	$12,300,000	
Increase due to new state activities	1,400,000	
Miscellaneous increases, due in large part to expansion of services rendered by state	5,392,000	
Total		$19,092,000
Increase in Capital Outlays Paid for Out of Current Revenues		
Due to financing from revenues of canal and highway improvements formerly financed through bonds	$7,400,000	
New York-New Jersey vehicular tunnel, 1923 expenditures	3,400,000	
Due to increase in volume of state building activity	1,100,000	
Due to higher building costs	1,400,000	
Total		13,300,000
Increase in State Grants and Subventions		
State aid in support of local education	$31,234,000	
State aid to towns and counties for highway purposes	3,234,000	
Indemnities paid to farmers for destruction of diseased cattle, etc.	2,294,000	
Relief of war veterans	963,000	
Total		37,725,000
Balance of remaining increases less decreases		870,000
Total increase in expenditures		70,987,000

STATE AID AND SUBVENTIONS

It is worthy of note that about half of the growth in state expenditures between 1917 and 1923 applied, not to the ordinary expenses of state government, but to aids and subventions granted to local political units. To the extent that the sums thus granted would otherwise have been raised through local taxation, this increase represents a lightening of the local tax burden on real estate and the participation by localities in state revenues. An idea of the present degree of this participation may be gained from the fact that in 1923 state aid for educational and highway purposes represented about one-third of the total of all state expenditures.

EFFECT OF HIGHER PRICE AND WAGE LEVEL

It is estimated that the state's current expenses for 1923 would have been $12,300,000 less than they actually were had wages and prices remained at their 1917 level. Capital outlays for building

projects would have been approximately $1,400,000 less had the 1917 price level been maintained. Approximately $13,700,000, or about one-fifth of the total increase in state expenditures as between 1923 and 1917, may, therefore, be directly attributed to depreciation in the purchasing power of the dollar.

This estimate does not include increases in state disbursements resulting indirectly from the effects of a higher price level. Thus, capital outlays for canal and highway projects doubtless cost more in 1923 than they would have at 1917 prices, but since only building construction was financed out of current taxes in 1917, the entire increase in expenditures for outlays other than buildings has been considered as being due to the changed financing policy of the state. Had the state continued its former practice of paying for such improvements through the sale of bonds, only a small fraction of this increase would have appeared in 1923. The remainder would have been distributed over the life of the bonds in the shape of increased interest and amortization charges.

Similarly, a portion of the increase in state aid for educational and highway purposes might indirectly be charged to the advance in prices. As previously pointed out, the total cost of public education for the state as a whole increased by 170 per cent during the period under review, and on the basis of continuing to bear its 1917 proportion of this cost, the state would have had to increase its 1917 support by $12,000,000.

FINANCING OF PERMANENT IMPROVEMENTS

About 15 per cent of the total increase in state expenditures as between 1923 and 1917 is ascribable to the defraying out of current revenues of the cost of permanent improvements formerly financed through the sale of bonds. In the case of a project like the New York-New Jersey vehicular tunnel, which is expected to yield a revenue, this means that the present generation of taxpayers is paying for an investment, the revenue from which will serve to reduce the taxes of a future generation, the very generation which will benefit from the tunnel.

INCREASE IN STATE SERVICES

The period between 1917 and 1923 was characterized by a growth both in the variety and volume of services rendered by the state, of which the establishment of a state constabulary, the opening of the barge canal, the extension of the highway system, and the increase in the number of persons cared for at state hospitals and charitable

institutions, may be taken as representative. It is not possible to determine the exact amount of the additional expense entailed by this increase in service rendered, but it may safely be said that it accounts for the bulk of the remaining increase in total state expenditures.

97. THE BUDGET IN THE MODEL STATE CONSTITUTION[1]

By A. E. Buck

The need for a budget system in controlling the finances of state governments is now admitted by practically everyone. In fact, forty-five states have already provided by statute or by constitutional amendment for the establishment of such a system. There is still, however, considerable difference of opinion upon the method by which a budget system should be established. The main questions at issue are two—the second being a corollary of the first. Should the state budget system be established by writing some provisions in the constitution? If so, what budgetary provisions should be written in the constitution?

So far, three states (Maryland, Massachusetts and West Virginia) have written budget provisions in their constitutions. With most of the other states the budget system has been "on trial." Although a number of the states have amended their budget laws from time to time, or have passed new budget laws repealing the old laws, the experience of these states without exception has been such that not one has thought of abandoning the budget system. On the contrary, there is a growing opinion among the states that it has vindicated its usefulness to such an extent that it should be made a permanent procedure for state governments. In order to give it this permanency, it should be written in the state constitution. When this is done the system will not be susceptible to every political wind that blows; consequently, it will be much more effective as a method of conducting the state's business. The National Municipal League's committee was unanimously of the opinion that certain general provisions for a budget system should be included in the model state constitution.

When it came to drafting the budget provisions the members of the committee agreed that only the bare essentials of budgetary pro-

[1] Reprinted from the *National Municipal Review*, July, 1921, by permission of the editor.

cedure should be incorporated in the model constitution and that all details should be left to a supporting statute. As a basis for determining these essentials the committee started with the principle that financial planning for the going concern of government is initially a function of the executive; therefore, the governor should be responsible for the preparation of the budget. But it was agreed that the application of this principle should not operate to curtail legislative power or control over the appropriation of public funds.

GOVERNOR TO DIRECT THE PREPARATION OF THE BUDGET

The budget provisions of the model constitution presuppose a compact administration composed of about a dozen departments, the heads of which are directly responsible to the governor (see discussion in National Municipal Review for April, 1921, pp. 226–232). Such an organization enables the governor to prepare a comprehensive budget plan, and, what is even more important, it places him in a position where he can really carry out the plan when the legislature has authorized the appropriations.

It is assumed that the new governor will take office about two months before the opening of the regular session of the legislature. In fact, preceding sections of the model constitution provide that the governor will be inaugurated on the first Monday in December and that the legislature will meet on the first Monday in February. This provision remedies the situation existing in a number of states where the outgoing governor prepares the budget for the incoming governor and his administration. It allows sufficient time for the new governor to get the budget in shape for presentation to the legislature at the beginning of the session or not later than one week after the session begins. There is also an advantage in requiring the budget to be submitted to the legislature early in the session; it gives plenty of time for committee consideration and review by the members themselves.

It is presumed that the governor will have a permanent budget staff agency either in a department of finance or attached to his own office, which will work under his direction in the preparation of the budget and will be engaged in gathering budget information throughout the year. Such a staff seems quite essential to successful budget-making since budget needs are determined largely on the basis of past experience.

For the preparation of the budget the various departments, offices and agencies are required to furnish the governor such information in such form as he may require. This provision applies to the courts,

the legislature and all agencies of whatever character requesting or receiving financial support from the state. It implies that the governor through his staff agency is to provide a budget classification and standard forms upon which the estimates are to be submitted. The time for submitting the estimates and definite responsibility for their preparation may be fixed by statute.

FORM OF BUDGET DOCUMENT NOT SPECIFIED

Nothing is specified as to the form and contents of the budget beyond the general statement that the document must set forth "a complete plan of proposed expenditures and anticipated revenues" for the next ensuing fiscal year. As yet the budget movement in this country is not old enough to have developed a standard form to be followed in making up a budget document. So far, different states have found it necessary to emphasize different features of the financial plan. Where detailed provisions on the form of the budget have to be written in the constitution, as is the case in Maryland, they have hindered rather than helped the making up of a concise and easily understood document. The development of the technique of properly presenting information in the budget document should not be hampered by constitutional provisions. Our budget experience up to this time indicates pretty clearly one thing: that the complete budget plan—all proposed expenditures and the means of financing them—should be and can be presented in a single-page statement, the remainder of the budget document to consist of supporting schedules to this statement. If the governor proposes expenditures in excess of the anticipated expendable resources of the state, this fact should be clearly shown; and it should then be the duty of the governor to recommend additional means of meeting the proposed expenditures. Otherwise his budget plan will not be complete.

GOVERNOR TO SUBMIT APPROPRIATION AND REVENUE BILLS TO LEGISLATURE

The governor, at the time of submitting the budget to the legislature, is required to introduce a general appropriation bill containing all the proposed expenditures set forth in the budget and likewise a bill or bills covering all recommendations in the budget for additional revenues or borrowings by which the proposed expenditures are to be met. There are three very good reasons for this provision. When bills to carry out the budget plan are submitted with the budget, the legislature has something concrete to refer to its committee and to

set to work upon; otherwise the legislature may be inclined to regard the budget merely as an administrative report and for that reason give little attention to its recommendations. By this procedure the governor is given an opportunity to set up in the appropriation act whatever degree of itemization he thinks is necessary and to suggest the terms and conditions to be attached to the appropriations. Furthermore, if the governor proposes to expend more money than can be raised under the existing revenue laws, he should propose measures by which additional funds are to be raised; the legislature should not discuss and pass upon appropriations without considering, at the same time, the sources of income to meet them.

GOVERNOR'S APPROPRIATION BILL GIVEN PRIORITY IN THE LEGISLATURE

The legislature is required to pass upon the general appropriation bill and any emergency appropriations recommended by the governor before taking up any appropriation bills introduced by members of the legislature. This provision gives precedence to the budget program. It aims at bringing about early consideration of the budget plan by the legislature and at keeping the attention of the members of that body concentrated on the plan until it is finally acted upon. Emergency appropriations cannot be made for a longer period than the date when the general appropriation bill becomes effective.

LEGISLATURE NOT LIMITED IN ITS ACTION ON GOVERNOR'S PROPOSALS

The legislature is not limited in its action upon the general appropriation bill. It may amend this bill by increasing, decreasing, or striking out any of the items, or by adding new items. As a safeguard against ill-advised action on the part of the legislature either in changing the general appropriation bill or in passing special appropriation bills, the governor is given the power to veto, as a whole or in part, items in such bills. As a further check the legislature is not allowed to appropriate for any fiscal period in excess of the expendable resources of the state for that period.

Only the Maryland budget amendment and those amendments or laws which have been copied from it have placed restrictions upon the power of the legislature to increase the governor's budget proposals. Of the five states which adopted the Maryland provision, New Mexico and Nevada have eliminated it from their budget laws.

Utah is dissatisfied with it and likely to eliminate it at this session of the legislature, (1921) and Indiana's proposed budget amendment (copied from Maryland) failed to pass the recent legislature a second time largely on account of this provision. West Virginia has the provision embodied in a constitutional amendment. The experience of both Maryland and West Virginia on this point has not been very satisfactory. It would seem that such a provision is practically unnecessary in a state government where the administrative organization centers responsibility in the governor, as is proposed under the model constitution. If the legislature should appropriate more money than is necessary to carry on the activities of the government, the governor can prevent the expenditure of it since he is in complete control of the activities. The only need, then, for such a provision is to catch the appropriations that may be made for local purposes, the expenditure of which is not administered by the governor. In such cases the governor has the right to exercise his veto power and consequently prevent the appropriation from becoming law unless it is repassed by a two-thirds vote of the legislature, in which case the responsibility is clearly upon the legislature.

LEGISLATIVE PROCEDURE ON THE BUDGET

The legislature, which is to be a *unicameral* body, is required to hold at least one open session in its consideration of the budget at which taxpayers and the general public may appear and be heard on any of the budget proposals. One-fifth of the members of the legislature may require the governor to appear before the legislative body to explain the budget, or it may require the governor or his designated representative to appear before any of the legislative committees. This procedure is designed to give a minority group in the legislature a chance to criticize the budget plan and by this method to interest and inform the general public. The governor may voluntarily appear before the legislature and discuss the budget. Under other provisions of the model constitution he and his department heads are given seats in the legislature, but without votes. It is presumed that the legislative procedure which is used will be such as to give full publicity to the consideration of the budget at all stages in its passage through the legislature. It is intended that all budget problems will be handled by a single committee. This will tend to preserve the unity of the budget plan and will avoid the bad practice in a number of states where five or six legislative committees work independently on different phases of the budget plan at the same time.

INDEFINITE AND CONTINUING APPROPRIATIONS ELIMINATED

Finally, as a check against indefinite and continuing appropriations, it is provided that no money shall be paid out of the state treasury except in accordance with specific appropriations made by law, and that an appropriation shall not confer authority to incur obligations against it after the termination of the fiscal period to which it relates. This enables all accounts to be closed at the end of the fiscal period and a complete budget to be set up for the ensuing fiscal period. Appropriations for capital purposes which cannot be materialized within the fiscal period should lapse at the end of the period and new appropriations should be made for continuing the work. Indefinite and revenue appropriations should not be made, as neither can be properly controlled. All revenues should go into the state treasury and expenditures should be made only upon definite appropriations by the legislature. Continuing appropriations have recently been abolished by law or discontinued in practice by several of the states. Wisconsin is the most notable example of a state having a system of continuing appropriations.

Beard, (4th Ed.), pp. 654–671.
Mathews, pp. 303–340.
Kimball, *State and Municipal Government,* pp. 225–237.
Ogg and Ray, (2nd Ed.), pp. 720–740.
Dodd, *State Government,* pp. 410–453.

XXV

THE LEGAL SYSTEM OF THE STATE

Under our federal system of government the States retain the major problems of civil disputes and the administration of criminal justice. The common-law principles were taken over from the English system. The state constitutions jealously guarded the rights of citizens to jury trials and sought to prevent tryannies, but in the end they built a marvelous legal system which has partially defeated the very ends for which it was created. Denial of justice, the scandal of the laws' delays, the problem of law enforcement, all are indictments of conditions which to many jurists and publicists seem appalling. Accusations have been made that the American people are not law-abiding, and protests have been raised against sumptuary legislation. Too little attention has been paid to the necessity for quicker, surer justice which would expedite the punishment of the criminal and insure the same treatment to rich and poor alike. The problem of the state is to devise a way to meet these two needs. The safeguards of constitutional provisions have prevented the attainment of these ends, and reforms have come slowly because of hostility to change.

98. SPEECH OF ELIHU ROOT IN THE NEW YORK CONSTITUTIONAL CONVENTION ON ENDING THE SCANDAL OF THE LAWS' DELAYS—AUGUST 19, 1915

The Convention in Committee of the Whole, having under consideration the sixth section of the proposed revised Judiciary Article requiring a brief and simple Practice Act, Mr. Root said:

Mr. Chairman, I want to say a few words which are stirred up by the appeal to memory by the gentleman from Saratoga.

I remember the conditions which existed prior to the adoption of the Civil Procedure Act of 1875, going back a good many years before. I was in the thick of the controversy long before Montgomery Throop changed it in his great tome which was called "The Code of Civil Procedure," and the controversy was between the old common-

law practice and the advocates of the reform procedure which went all over the country.

That reform was accomplished under the express direction of the Constitution of 1846.

I remember that Mr. Stoughton, that able and eminent lawyer, never could speak of the code, when Mr. Field was anywhere about, without calling it "your d——d code, Mr. Field." I remember once being in court in a case in which both Mr. Field and Mr. O'Connor were engaged, and Mr. Field put some question during the argument to Mr. O'Connor as to the effect of the pleadings and O'Connor turned on him and said, "I understand, Mr. Field, that under your code, the plaintiff comes in and tells his story like an old woman, and the defendant comes in and tells his story like another old woman." That was all he could get out of O'Connor on this question of pleading.

These were the conditions, and they are continually recurring.

Under the old common-law system practice had become so complicated and difficult that it was hard for an honest man to get his rights. There is a good deal of human nature in that. It has been so since the laws of the Medes and Persians were formulated; it has been so since the day of Egypt's power. Wherever a special class of men have been entrusted with the formulation and administration of law, they tend to make it a mystery; they tend to become more and more subtle and refined in their discriminations, until ultimately they have got out of the field where they can be followed up by plain, honest people's minds, and some power must be exerted to bring them back. The Constitution of 1846 exerted that power to bring the practice of the law out of the discredit into which it had fallen because of the intricacy and the complication and the technicality and the sublety of the old common-law practice. Mr. Field brought it back with the code, of three hundred and odd sections, which bears his name, and the reform in procedure went all over the country. Curiously enough, just about the time that England followed the example and adopted the reformed procedure in her judicature act of 1873, we began to take a back track and Mr. Throop's attempt to condense in a volume which was called the Code of Civil Procedure a great number of particular and minute provisions regarding practice was the first great step in that direction, in the backward direction.

Now, in the forty years which have elapsed, we have been following in that same pathway until the people of our State have come to regard the simplification of practice as one of the great issues of the day. I believe there is no duty which is demanded from this Convention more generally than the duty to do something to make our practice more simple, speedy, inexpensive and effective. Why is it?

A careful study of it reveals the cause, or the principal cause. I have listened to discussions and have taken part in them in the Bar Association of my own city, in the State Bar Association, in the American Bar Association, in countless conversations with lawyers and with laymen, and I say the cause of the prevailing discontent with our practice is to be found in the fact that year by year during all this period of forty years, there has been a continual addition, step by step, statute by statute, to the multitude of definite, certain, precise rules of procedure, binding upon the men that seek redress of wrongs in the courts. One of our most honored and beloved judges in the Court of Appeals said to me the other day, when I asked him how he thought this plan would work, "I have had since I came here to buy fifteen editions of the Code because it is so continually changed that after every session of the Legislature my last edition is useless," and he gave this plan his warm approval.

The trouble is not in a particular provision. These provisions that are put in are put in with good intent. The men who propose them in the Legislature are honest men who believe that they are useful, but they are not the result of any general view of the subject. They are the result of particular views of the needs of particular cases; and a provision that a member of the Assembly or the Senate may well honestly believe to be useful upon his experience in a particular case, may work very badly, interfering with the obtaining of justice in many other different cases. And when you come to put them all together, you have a great variety of statutory rights. Each one of these is a statutory right. I heard the other day a lawyer in New York boast that he could postpone any litigation for seven years, and I asked a lot of friends as I came along whether that was true, and they all said they did not doubt it. How? Why, by compelling the honest fellow that comes into court to redress a wrong or to secure a right, to litigate one after the other these statutory rights that have been created by the Legislature. Courts cannot ignore them because they are rights given by law. The courts must observe the law, and so the plain man who wants to get a wrong redressed has, bristling between his demand for redress and his judgment, a dozen litigations that he has to fight out before he can get to the end of his cause.

My friends of the Bar, we have been making our system of procedure here conform to the subtle, acute, highly-trained ideas of lawyers. That is not the true basis. The system of procedure, of course, cannot be simple, but as far as possible, it ought to be made to conform to the plain man's intelligence and experience. It ought to be so that the farmer and the merchant and the laborer can understand it, and know why he is delayed in getting his rights; can under-

stand that the processes to which he is subject have a reason and know what the reason is, otherwise you cannot have that respect for the law, that confidence in its justice necessary for the maintenance of a system of just administration. And furthermore the existence of this great variety of minute, detailed statutory provisions has been breeding up a great number of code lawyers, and by that I mean lawyers whose principal concern is with the statutory code of rights and not with getting justice for their clients.

Now, we ought to get back, get back to the fundamental idea of our profession which is the administration of justice. These minute, particular Code provisions substitute rules, multitudes of rules for the justice of the particular case. I agree with Mr. Brackett. I am old enough at the Bar to have the men who were my partners, my juniors, my clerks, sitting on the bench, and I look at them from a different angle from that which I can recall forty or fifty years ago when I looked up to those men high up above—they are men like the rest of us. But, my friends, they are honest and just. They want to do justice if they can be permitted to. They will do justice if they are permitted to. This network of meticulous rules that are made by our Legislature with honest purpose prevents them from doing justice in the particular case; and the people of our State and of our country understand this. They may not understand the details. They may not know why, but they feel that the pathway of justice is obstructed. They feel that the honest man would better lose his claim than go into court and spend his time and money in the law's pursuit which seems to have no end. And they are indignant over it and restless and dissatisfied over it, and they look to us to do something. Now, what is it? What can we do? I can assure you that I have done the best I could for years to try to find some formula, some method by which the thing that the Constitutional Convention of 1846 did could be done again, for by a different route we have come into the same condition with which they dealt and after most earnest thought, particularly as the result of the discussions in all these Bar Associations, I have not found anything that offered so much light as the proposal of our Judiciary Committee.

Now, it is not simple, but show us something better. We must do something. We cannot go home and say to our friends and neighbors we have given you no relief in this matter that concerns you so deeply.

Show us something better than that. What is it? In the first place it requires the Legislature to act upon this report of the Commission on statutory consolidation. It does not say how they shall act. We don't undertake to interfere with them in that.

In the second place, it requires them to pass some sort of a brief civil practice act and adopt some sort of rules of procedure; it requires these two divisions. That is following what our neighboring state of Connecticut has adopted. They have a practice act that you can fold up and put in your side pocket. When the Legislature in its wisdom has done that, then two results are provided, one is that the Legislature shall stop the eternal tinkering with the practice, stop passing laws which are brought in here by individual members upon a narrow view of the occasion for them; shall stop every year pouring out a stream of amendments, and making new rules to cure the evils of old rules, and shall confine its action to periodical action upon the report of a commission. I agree with the idea that the Legislature itself has not the time to elaborate and work out a system. They have too many other things to do. Accordingly the practice has become quite universal of having commissions appointed which shall prepare and present to the Legislature well-considered measures. The Legislature is given the fullest power; that is, it retains the fullest power to act upon reforms. It does not have to follow the recommendation of the Commission. When the Commission has reported, the Legislature can throw their recommendation out the window if it sees fit; but the action of the Legislature is concentrated on the point where it has the report before it, so that it will act upon the subject and not upon the ideas of A to-day and B to-morrow and C the day after, upon particular rules, but it will act upon a system of practice as a whole, upon the report of a commission of its own selection, and it will act once for all until another period has elapsed, and so you stop this meticulous interference with practice, and you have an opportunity to test the provisions which the Legislature adopts from time to time on the reports of its commissions. In the meantime the courts are authorized to proceed with their immemorial function of amending and adjusting the rules subject to the practice act of the Legislature so that they will contribute to the doing of justice in the individual case and discourage these technicalities and subtleties which tangle justice in the net of form.

Now, there is nothing that cannot be criticized; nothing that cannot be doubted. Of course the judges when they come to make their rules may make rules that Mr. Wickersham would approve and Mr. Brackett would disapprove, or it may be just the other way. But if the judges make rules or amendments to the rules that do not on the whole seem to be right, at the next period, when the Legislature takes the subject up, it will put into its practice act a provisionsvobou will control the bad rule. This provision reported by the Committee is highly meritorious in that it compels the Legislature to act in the

broad way upon procedure as a whole, and at the same time it enables the Legislature to control and correct any tendencies by the court to go wrong in either direction. I have seen and heard of no proposal to accomplish the thing that we clearly must accomplish which seems to be so effective as that proposed by the Committee.

99. CRITICISMS OF THE GRAND JURY[1]

In cases where the accused is arrested on a complaint, and examined by a justice of the peace or a judge, if it is found that an offense cognizable in the circuit court has been committed, and that there is probable reason for believing the accused guilty, the accused is bound over to await the action of the grand jury. The grand jury must find an indictment against the accused before he can be brought to trial. In this procedure it is necessary for the state's witnesses to appear before the examining magistrate, the grand jury and the trial court. It is urged that this is too great a hardship upon the witnesses.

It is also contended that in such cases the action of the grand jury is superfluous, because it acts merely as a ratifying body for the examining magistrate or the state's attorney.

One recent author defends the grand jury as follows:[2] "There are many cases of a trifling nature which are returned by the committing magistrates and when brought before the grand jury the indictments are ignored. In counties where the volume of business is small it would be of little consequence if the grand jury found true bills even in these cases, but in counties where the volume of business is large . . . it then becomes of vital importance that there should be a tribunal to sift from the great mass of cases those which are too trifling in their nature to receive further prosecution; and this is a duty which could not well devolve upon one single officer, for unless testimony was heard by him, there would be no feasible way to determine which cases should be prosecuted and which ignored. If evidence is therefore to be heard, it is wiser that it be heard and considered by a body impartially selected from the people than by a single officer whose training would incline him to find grounds upon which the prosecution might be sustained."

Some objection is made to grand jury proceedings because the accused has no opportunity to explain away the evidence. The proceedings are ex parte, the grand jury hearing only the evidence for the state. Where the accused is arrested and brought before a judge

[1] From *Illinois Constitutional Convention Bulletin*, No. 10, 1920, *The Judicial Department*, pp. 832–836.

[2] Edwards; *On the Grand Jury*, page 35.

or a justice of the peace for a preliminary examination evidence both for and against the accused is heard.

It is also contended that the examination by the grand jury is not an economical proceeding. In Cook County, 276 grand jurors served during each of the years of 1916 and 1917, and only 600 persons were drawn for grand jury service during each of these years. The fees of grand jurors are three dollars per day.

The grand jury system has been criticised on account of its secret deliberations. It is urged that secrecy tends to permit unfounded and malicious accusations to be made by parties who would not dare to act openly; and that, regardless of the ultimate outcome of the prosecution of an indictment founded upon an ungrounded charge, the reputation of the accused must suffer. In answer to this, it is pointed out that the statute requires that the names of all witnesses shall be endorsed upon the indictment, and also, that the secret deliberations permit people more readily to bring and have investigated complaints against the more powerful criminals.

In answer to the argument that the grand jury is a useless institution, and that its work could be performed by allowing the state's attorney to file an information, it is urged that in cases where the accused is powerful and has influence, or is a friend of the state's attorney, this official may hesitate to act; that in such instance a body of representative men of the county may be found to be better fitted to act, and evidence may be submitted to the grand jury, which the state's attorney would hesitate to submit to a magistrate, where he had to assume the responsibility for instituting the proceedings.

Assuming the continuance of the grand jury, it is contended that there is no necessity for a grand jury consisting of twenty-three jurors, as a smaller number would be sufficient.[3]

THE GRAND JURY IN OTHER STATES

Georgia, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, Vermont, Virginia and Wisconsin have no constitutional provisions requiring indictments by a grand jury. The statutes of these states, however, require or permit grand juries. The constitutions of all other states contain provisions requiring or permitting indictments by a grand jury in criminal cases, or in certain classes of criminal cases. In some of these states, indictment by a grand jury is optional, other methods being provided to replace the indictment. A few states require indictment by a grand jury only in capital cases or in cases where the punishment is by imprisonment for

[3] *Illinois State Bar Assn. Proceedings,* 1917, p. 426.

life. In several states the grand jury may be abolished, and in some states the number constituting a grand jury has been fixed at less than the common law number.

In twenty-five states the constitutions require indictments for certain crimes. Nearly all of these states require indictments only for felonies, but the constitutions of Arkansas, Nebraska, New Jersey, South Carolina, Tennessee, and West Virginia require indictments for all or some misdemeanors, as well as for felonies. Connecticut requires an indictment only for those crimes in which the punishment may be by death or imprisonment for life. The Louisiana constitution requires an indictment in capital cases, but in other cases the accused may be held to trial on information.

The constitutions of Colorado, Nebraska, North Dakota and Wyoming, provide that the legislature may change, regulate or abolish the grand jury. The constitution of Nebraska permits the legislature to provide for holding persons to answer for criminal offenses on information of a public prosecutor. The Iowa constitution permits the legislature to provide for holding persons to answer for any criminal offense without the intervention of the grand jury. The constitution of Indiana contains a provision that the legislature may abolish or modify the grand jury system. The constitutions of Alabama, Arkansas, Mississippi and Delaware permit the legislature to dispense with the grand jury in misdemeanors and to authorize such prosecutions before justices of the peace or in inferior courts.

The constitutions of Arizona, California, Idaho, Missouri, Montana, Nevada, Oklahoma, South Dakota, Utah, and Washington provide that cases may be prosecuted by information as well as by indictment. An examination and commitment by a magistrate is a preliminary requirement to the filing of an information in Arizona, California, Idaho, Montana, Oklahoma and Utah. The constitution of Louisiana which requires an indictment in capital cases, permits information in all other cases.

NUMBER

The constitutions of a number of states specify the number that shall constitute the grand jury. Where this is specified the number required to find an indictment also is usually fixed by the constitution.

The following table shows the number constituting the grand jury and number required to find an indictment in the states in which these numbers are specified in the constitutions:

State	*Number composing the grand jury*	*Number necessary to return a verdict*
Colorado	12	9
Iowa	5 to 15 (as legislature may provide)	..
Kentucky	12	9
Louisiana	12	9
Missouri	12	9
Montana	7	5
Ohio	To be determined by law	To be determined by law
Oklahoma	12	9
Oregon	7	5
South Carolina	18	⅔
Texas	12	9
Utah	7	5
Wyoming	12 (May consist of)	9

The number of grand jurors in no place is more than the maximum at common law. The tendency has been to decrease the number of grand jurors. In Montana, Oregon and Utah only seven are required, and five of the seven may return a verdict. In those states in which the constitution fixes the number of grand jurors at twelve, nine may return a verdict. In no state is a unanimous finding required.

RETENTION OF GRAND JURY FOR OCCASIONAL USE

In several of the states in which information and indictment are concurrent remedies, a grand jury can be called only upon an order of the judge of a court having power to try and determine felonies. A provision to this effect is found in the constitutions of Missouri, Oklahoma, Arizona, Montana, Idaho and Utah. The Utah constitution provides; "No grand jury shall be drawn or summoned unless in the opinion of the judge of the district, public interest demands it." The Arizona constitution provides; "Grand juries shall be drawn and summoned only by order of the superior court." The constitutional provision relating to convening of grand juries in Missouri, Montana and Idaho are similar to those in Utah and Arizona. The constitution of Oklahoma provides that the grand jury shall be convened by the judge upon his motion, or shall be ordered by the judge upon the filing of a petition signed by 100 resident tax payers of the county. Michigan, Kansas, Washington, California and South Dakota have constitutional or statutory provisions which permit an infrequent use of the grand jury.

CONCLUSIONS

The machinery in Illinois for committing accused persons and bringing them to trial is cumbersome. The work of committing magistrates is not closely coördinated with the processes of indictment and information, although preservation of evidence before the committing magistrate is definitely provided for before the municipal court.[4] The coroner's inquest, although once an important element in bringing certain types of offenders to justice, has practically ceased to perform this service.

There has been a definite tendency in other states to reduce the use of the grand jury; although an exception to this statement should be made with respect to Oregon, where a constitutional amendment of 1908 substituted indictments for informations. Attention should also be called to the fact that in Illinois informations are not used for all offenses punishable by fine or imprisonment otherwise than in the penitentiary, although this is constitutionally permissible. Where the grand jury is retained for regular use, there has been a tendency to reduce its size.

Although constitutional changes in a number of other states have rendered the use of the grand jury less frequent, there has been little tendency to abolish the grand jury altogether. While information has been regarded as sufficient for ordinary use, it had been thought that a grand jury may be worth while as an occasional instrument to meet emergencies or to proceed where the prosecuting officer does not or will not act. An option, such as that which exists under the constitution of Illinois, to abolish the grand jury "in all cases," probably would not have been taken advantage of in the states which have restricted the use of grand juries.

Letters were written to a number of the states which retain the grand jury, but use informations for ordinary purposes, and replies were received from Arizona, California, Idaho, Michigan, Montana, Nevada, South Dakota, Utah and Washington. In Michigan there is no grand jury except where ordered by the circuit court, and apparently there are not more than a half dozen grand juries called in the state during the course of a year. The information system is said to work satisfactorily, and grand juries when called are apparently not regarded as of great use.

The letters from all the other states just enumerated, agree in substance with the statement from Michigan, all of these states having about the same plan for calling a grand jury. The grand jury is

[4] *Hurd's Revised Statutes,* Chap. 37, Sec. 313c.

regarded as important and is occasionally used in these states in "graft" prosecutions, in cases affecting public officers, and upon other exceptional occasions. In Seattle, Washington, it has become customary to have a grand jury once a year; but in smaller counties of the states, here under discussion, a grand jury is infrequent. A former district judge of Idaho reported that two grand juries were used during his twelve years of service. From Arizona a statement was received that the grand jury is infrequently used, although the correspondent expressed a personal preference for the grand jury.

If constitutional changes are made as to the use of the grand jury, it is assumed that the matter will not be dealt with in detail by the constitution. Committing magistrates and coroners are now covered by statute, and it is not necessary that they be regulated by the constitution.

100. DENIAL OF JUSTICE[1]

No testimony presented to the commission has left a deeper impression than the evidence that there exists among the workers an almost universal conviction that they, both as individuals and as a class, are denied justice in the enactment, adjudication, and administration of law, that the very instruments of democracy are often used to oppress them and to place obstacles in the way of their movement toward economic, industrial, and political freedom and justice. Many witnesses, speaking for millions of workers as well as for themselves, have asserted with the greatest earnestness that the mass of the workers are convinced that laws necessary for their protection against the most grievous wrongs can not be passed except after long and exhausting struggles; that such beneficent measures as become laws are largely nullified by the unwarranted decisions of the courts; that the laws which stand upon the statute books are not equally enforced; and that the whole machinery of Government has frequently been placed at the disposal of the employers for the oppression of the workers; that the Constitution itself has been ignored in the interests of the employers; and that constitutional guaranties erected primarily for the protection of the workers have been denied to them and used as a cloak for the misdeeds of corporations.

If it be true that these statements represent the opinions of the mass of American workers, there is reason for grave concern, for there are

[1] Adapted from Commission on Industrial Relations, *Final Report, Sen. Doc. No. 465*, 64th Congress, pp. 38–55.

25,000,000 of them, of whom 3,000,000, are welded together into compact organizations.

But if it be true that these charges are justified; if, in fact, our legislators, our judges, and executives, do not afford equal consideration to the workers and are concerned with protecting the rights of property rather than the rights of men, and at times even become the instruments for the oppression of the poor and humble, then the situation demands and must receive the prompt and decisive action of every right-thinking man in order that these evils may be eradicated and justice and liberty established in the place of injustice and oppression.

Before examining the evidence, it should be understood that it is not charged that such acts of injustice are universal, but that they occur so frequently and in such diverse parts of the country that any man may reasonably fear that he himself or those with whom he is associated may at any time be the victim of injustice or discrimination. It has been urged, and perhaps properly, that the charges would be sustained if it were found that such acts of injustice had been committed only upon rare occasions, if it should also be established that such injustices were allowed to stand without redress, and if those who were guilty of their commission were left unimpeached and unpunished.

An enormous mass of evidence bearing upon these charges has been presented to the commission by witnesses or collected by its staff. This material is presented in some detail in another part of the report, but the summary which follows may be regarded as reasonably full and exact.

First, with regard to the enactment of laws, it is charged that the workers have been unable to secure legislation to protect them against grievous wrongs, except after exhausting struggles against overwhelming odds and against insidious influences.

The evidence bearing upon this question has dealt with the history of three principal lines of legislation in which the evils sought to be remedies are now universally admitted to have been very great, involving wanton destruction of life, the exploitation of women and children, and the practical enslavement of American seamen. A careful examination has been made of the history of attempts to secure adequate legislation to prevent child labor, to protect women against extreme hours of labor and night work, to secure the safety of factories, railroads, and mines, and to provide for the safety, comfort, and liberty of seamen.

The history of child-labor legislation shows that although agitation for the protection and education of children began during the early

part of the nineteenth century in Massachusetts, Rhode Island, Connecticut, New York, and Pennsylvania, no adequate legislation was obtained until nearly the end of the century. Time after time in each of these industrial States the sentiment of the public was aroused, organization was effected, and well-drafted bills were introduced only to be killed in committee, emasculated or killed on the floor of the legislature, or passed with exceptions which rendered them entirely ineffective. Even the attempt to reduce the hours of children below 12 per day was bitterly contested and met by every known trick of legislative chicanery. The whole history of the contest for adequate child-labor legislation is even now being repeated in some of the Southern States, where laws prohibiting the employment of children are bitterly contested and beaten session after session by legislators, unsympathetic or controlled by the cotton-mill interests.

Similarly, although the movement to restrict the working hours of women and to prohibit night work began in Massachusetts and Pennsylvania as early as 1840, the first legislation limiting the hours was the 10-hour bill passed in Massachusetts in 1874, and night work went unregulated until the passage of the act of 1899 in Nebraska.[2]

The movement for safety of life and limb in the factories and workshops, although pushed with great vigor in almost every session for such obvious matters as the guarding of set screws and gears, made practically no provision for their enforcement. No really effective action to promote safety took place until after many years of hard fighting. The first workmen's compensation acts were passed between 1900 and 1910, which for the first time made the unsafe condition of factories directly expensive.

Even upon the railroads, where the safety of the public as well as of the workers was involved, at least 10 years of constant agitation on the part of the railroad brotherhoods and various interested citizens was necessary before the first Federal act providing for safety appliances was passed in 1893.

[2] It is worthy of note that although the decision on the Massachusetts law was favorable and thus established a precedent (Commonwealth v. Hamilton Mfg. Co., 120 Mass., 383), it was thrown aside by the Illinois court in 1895 in holding unconstitutional a law of that State prescribing an 8-hour day for women (Ritchie v. People, 155 Ill., 98), and it was not until 1910 that the same court accepted a 10-hour law as constitutional (Ritchie v. Wyman, 244 Ill., 509). The Nebraska statute limited the hours of women to 10 a day and prohibited night work between the hours of 10 P. M. and 6 A. M., but the first case did not raise the question of night work (Wenham v. State, 65 Neb., 394). In New York, however, a statute regulating night work was held unconstitutional in 1907 (People v. Williams, 189 N. Y., 131), and it was not until the present year that a similar law was sustained (People v. Schweinler Press, 214 N. Y., 395).

In the case of the movement to secure the safety, comfort, and liberty of seamen, it is a matter of record that Andrew Furuseth, president of the seamen's union, backed not only by all the members of his own organization but by the entire American labor movement, attended each session of Congress and devoted his whole energies to securing legislation upon this subject for the entire period of 22 years from 1893 to 1915, when the seamen's bill finally became a law.

Other evidence has been presented covering the long fights to secure legislation to remove the evils of company stores, payment in scrip, prison labor, arbitrary deductions from wages, "sweating," tenement houses, and a number of other matters upon which adequate legislation has not yet been secured, except perhaps in a few States, although there has been unremitting agitation upon these questions for more than half a century. This evidence shows clearly that the workers have just grounds for the charge that the legislatures have been criminally slow in acting for the relief of grievous wrongs and have used every subterfuge to escape adequate and aggressive action, even while thousands of men, women, and children were being killed, maimed, or deformed as a result of their negligence.

Evidence has further been presented to show that such a condition has not been the result entirely of the complacency or slothfulness of legislators, but that powerful influences have been at work to prevent such remedial legislation. The most convincing evidence presented upon this phase of the question is the record of the National Association of Manufacturers and its allied organizations, as contained in the testimony and findings before congressional committees,[3] in the printed reports of that association and in the testimony before the commission of the representatives of various State employers' associations. The substance of this evidence is so well known to Congress and to the public that it is necessary here to call attention only to the fact that the efforts of such associations in preventing the enactment of practically all legislation intended to improve the condition or advance the interests of workers were not confined to Congress, but were even more effective in the State legislatures.

The persistent and bitter manner in which the railroads fought the laws providing for safety appliances, although the measures were

[3] U. S. Senate Committee on Judiciary. Maintenance of a Lobby to Influence Legislation. Hearings before a subcommittee pursuant to S. Res. 92, 63d Cong., 1st sess.

Charges Against Members of the House and Lobby Activities of the National Association of Manufacturers of the United States and Others. Hearings before select committee of House of Representatives appointed under H. Res. 198, 63 Cong., 1st sess.

moderate and necessary, not only for the safety of the traveling public, but for the efficient operation of the roads, is well known to Congress.

Perhaps the most significant statement regarding the insidious influences of this character is contained in a letter from Mr. L. M. Bowers, chairman of the board of directors of the Colorado Fuel & Iron Co., to the Secretary of Mr. John D. Rockefeller, jr., under date of May 13, 1913:

> The Colorado Fuel & Iron Co. for many years were accused of being the political dictator of southern Colorado, and, in fact, were a mighty power in the entire State. When I came here it was said that the C. F. & I. Co. voted every man and woman in their employ without any regard to their being naturalized or not, and even their mules, it used to be remarked, were registered if they were fortunate enough to possess names. Anyhow, a political department was maintained at a heavy expense. I had before me the contributions of the C. F. & I. Co. for the campaign of 1904, amounting to $80,605 paid out personally by President Hearne. All the vouchers and checks I have examined personally, all of which were payable to Albert A. Miller, upon which he drew the currency and, it is said, handed the money over to Mr. Hearne, who paid it out. So far as I can discover, not one particle of good was accomplished for the company, but Mr. Hearne was an aspirant for the position of United States Senator and devoted a vast amount of time and money with this end in view, I have no doubt.
>
> The company became notorious in many sections for their support of the liquor interests. They established saloons everywhere they possibly could. This department was managed by one John Kebler, a brother of the one-time president of the company, who died about the time I came here, a victim of his own intemperate habits. A sheriff, elected by the votes of the C. F. & I. Co. employees, and who has been kept in office a great many years, established himself or became a partner in 16 liquor stores in our coal mines. To clean up the saloons and with them the gambling hells and houses of prostitution has been one of the things that Mr. Welborn and I have devoted an enormous amount of time to during the past five years. The decent newspapers everlastingly lampooned the C. F. & I. Co. at every election, and I am forced to say the company merited, from a moral standpoint, every shot that was fired into their camp.
>
> Since I came here [4] not a nickel has been paid to any politician or

[4] This statement of Mr. Bowers should be considered in conjunction with his testimony that the evil influences created by the Colorado Fuel & Iron Co. were still in power and his admission that the company was deeply interested in the last State election and that 150 men were put into the field from his office alone to work for the candidates favored by the company, which was deeply interested in the election of officials who would vigorously

political party. We have fought the saloons with all the power we possess. We have forbidden any politician from going into our camps, and every subordinate official connected with the company has been forbidden to influence our men to vote for any particular candidate. We have not lobbied in the legislature, but have gone directly to the governor and other able men and have demanded fair treatment.

Second, it is charged by the workers that after wholesome and necessary laws are passed they are in large part nullified by the courts either upon technicalities of a character which would not be held to invalidate legislation favorable to the interests of manufacturers, merchants, bankers, and other property owners, or thrown out on the broad ground of unconstitutionality, through strained or illogical construction of constitutional provisions. It is argued that such action is doubly evil, because the power to declare legislative acts unconstitutional has been assumed by the courts in the face of a complete absence of legal sanction, in complete disregard of early decisions denying the possession of such power, and in complete contrast to the practices of the courts in every other country of the civilized world. It is not within our province to decide whether or not this assumption of power by the courts was justified. It is sufficient here merely to examine the evidence bearing upon the allegations that laws necessary for the correction of grave industrial abuses, are nullified by strained interpretations or for reasons which would be insufficient in other cases, and that they are held unconstitutional upon pretexts which in reality are the outgrowth of economic bias on the part of the judges. . . .

That the courts, including even the highest tribunal of the Nation, do allow their economic bias to influence them in holding laws unconstitutional is nowhere more clearly expressed than in the dissenting opinion of Mr. Justice Holmes in the case of Lochner *v.* New York,[5] wherein the right of the Legislature of New York to limit the hours of work in bakeries was involved. He said:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agree with that theory (limiting the consecutive hours of labor in bakeries which may be required of an employee), I should desire to study it further and long before making up my mind. But I do not conceive

prosecute the strikers. His letters narrating how the governor of Colorado was whipped into line should also be considered, as well as the testimony of Dr. E. S. Gaddis, former head of the sociological department of the Colorado Fuel & Iron Co., that officials openly influenced elections.

[5] Lochner *v.* N. Y., 198 U. S., 45.

that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in laws.

. . . Some of these laws (referring to several which he has discussed) embody convictions or prejudices which judges are likely to share. Some may not, but a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State, or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

This statute of the State of New York, which had been sustained by the courts of New York, was thus held unconstitutional, we are assured by the highest possible authority, on the economic theories of five judges, whose bias is clearly reflected in the majority opinion. By that action not only were the bakers of New York deprived of all legal relief from the hardships of working long hours in underground bakeries, but the entire movement for relieving the condition of other workmen in similarly unhealthful occupations throughout the country was effectually checked for a decade. Can these judges, the workers ask, absolve themselves from responsibility for the thousands of lives which have been shortened as a result of their decisions, the ill health and suffering of other thousands who contracted disease as a result of unduly long exposure to bad conditions and a lack of sufficient fresh air and leisure? The provision of the Constitution which was held to be violated by this act was the fourteenth amendment, designed solely to protect the emancipated negroes. . . .

Finally, reference should be made to the history of the fight for the enactment of eight-hour legislation in Colorado, which illustrates the grounds upon which the workers not only of that State, but throughout the Nation, distrust legislatures, courts, and executive officials.

Although the 8-hour day was established in Colorado gold mines by agreement among the operators after the Cripple Creek strike of 1894, in the coal-mining industry a 20-year struggle followed the miners' first attempt at legislation.

The eight-hour bill presented to the general assembly in 1895, though supported by the Western Federation of Miners, the United Mine Workers of America, and labor organizations in general, was, upon reference to the Supreme Court for an advance opinion, reported as unconstitutional and failed of enactment.

A bill brought successfully to enactment in 1899, and which was substantially a copy of the Utah law upheld by State and Federal Supreme Courts, was declared by the Colorado Supreme Court to be unconsitutional.[6]

In 1901 the people adopted by an overwhelming vote an amendment to the constitution which provided for eight-hour legislation. This was followed by the introduction in the next general assembly (1903) of several bills, and by the inauguration of active opposition thereto on the part of corporations. No fewer than 11 anonymous bulletins were attributed to one officer of a smelting company.

On account of disagreements in conference, none of the several bills passed; and so great was the public outcry that at the extra session in July, 1903, each house passed resolutions blaming the other for the failure.

In the session of 1904–5 a bill substantially the same as the present law, and favored by all political parties, was so amended by Mr. Guggenheim as to be "absolutely worthless." It remained on the statute books, a dead letter, until 1911.

In 1911, house bill No. 46 was passed. The operators succeeded in having it submitted to a referendum vote, and at the last moment they initiated a smelterman's eight-hour bill, the two came up on the same ballot, and in the succeeding confusion both were adopted by the people, because of their genuine interest in the passage of an eight-hour law.

The legislature of 1913 repealed both the laws so enacted in 1911, and reënacted house bill No. 46, the present law. By a decision of the Supreme Court, allowing a "safety clutch," this law may not be referred.

The essential injustice and stupidity of this long fight of the employers against eight-hour legislation is strikingly shown by a letter from Mr. L. M. Bowers, chairman of the board of directors of the Colorado Fuel & Iron Co., to Mr. J. D. Rockefeller, jr., stating that after they saw that such legislation was inevitable, they tried out the eight-hour day in their mines and found that it was economically profitable. The Colorado Fuel & Iron Co. thereby is shown to have stubbornly resisted by every conceivable device, for a period of 20 years, a just law which was not only necessary for the health and welfare of its 12,000 miners but was actually profitable for the company itself.

The reason for the effectiveness of the opposition of the Colorado Fuel & Iron Co. is shown in the letter quoted on Page 669 from Mr. Bowers to the secretary of Mr. Rockefeller, describing the complete

[6] In re Morgan, 26 Colo, 415.

and corrupt control which the company exercised over the State government during this period.

Third, it is alleged by the workers that in the administration of law, both common and statute, there is discrimination by the courts against the poor and in favor of the wealthy and powerful. It is further stated that this discrimination arises not only from the economic disabilities of the poor, which render them unable to employ equally skillful lawyers, to endure the law's delay, and to stand the expense of repeated appeals, but out of an actual bias on the part of the judges in favor of the wealthy and influential. It should arouse great concern if it be true that the courts do not resolve their doubts in favor of the poor and humble; how much graver then is the injustice if the judges do in fact lean toward the rich and mighty?

To establish this claim by the presentation of a sufficient number of cases would be a tedious task. Many such have been presented to the commission but can not be considered fully here. Instead, it would seem that in such cases we may safely rely upon the uncontradicted opinion of weighty authorities whose position removes from them any suspicion of bias.

Ex-President William H. Taft has said:

> We must make it so that the poor man will have as nearly as possible an equal opportunity in litigating as the rich man; and under present conditions, ashamed as we may be of it, this is not the fact.

Prof. Henry R. Seager, of Columbia University, testified before the commission:

> I don't see how any fair-minded person can question but what our judges have shown a decided bias in favor of the employers. I would not be inclined to ascribe this so much to a class bias, although I think this is a factor, as to the antecedent training of judges. Under our legal system the principal task of the lawyer is to protect property rights, and the property rights have come to be concentrated more and more into the hands of corporations, so that the successful lawyer of today, in a great majority of cases, is the corporation lawyer. His business is to protect the rights of employers and corporations. It is from the ranks of successful lawyers, for the most part, that our judges are selected, and from that results inevitably a certain angle on the part of a majority of our judges. . . .

Fifth, it is charged that the ordinary legal machinery provides no adequate means whereby laborers and other poor men can secure redress for wrongs inflicted upon them through the nonpayment of

wages, through overcharges at company stores, through exorbitant hospital and other fees, fines, and deductions through fraud on the part of private employment offices, loan offices, and installment houses, and through the "grafting" of foremen and superintendents. The losses to wage earners from these sources are stated to amount each year to millions of dollars and to work untold hardship on a class of men who can ill afford to lose even a penny of their hard-won earnings. . . .

Sixth, it is charged by the workers that the courts, by the unwarranted extension of their powers in the issuance of injunctions, have not only grievously injured the workers individually and collectively upon innumerable occasions but have, by the contempt procedure consequent upon disobedience to such injunctions, deprived the workers of the right, fundamental to Anglo-Saxon institutions, to be tried by jury. . . .

Seventh, it is charged by the representative of labor that laws designed for the protection of labor in workshops and mines and on railroads are not effectively enforced, except in a few States. This is a matter of considerable moment to labor, but it is, after all, regarded by the workers, since it concerns chiefly only their safety and comfort, as ranking far below the other matters discussed, which involve primarily their liberty and rights as freemen and, secondarily, their only means of bettering their condition. Moreover, it is almost entirely a matter of administration, which is discussed in detail elsewhere in the report. With the great attention which the method of administration is now receiving, not only from labor organizations but from civic organizations, and lately even from employers' associations, it is likely to reach a satisfactory stage before very long.

Eighth, it is charged that in cases involving industrial questions, the workers are liable to great injustice by reason of the fact that in many localities they are excluded from juries either by the qualifications prescribed (usually payment of property tax) or by the method of selection. . . .

Ninth, it is charged by the workers that, during strikes, innocent men are in many cases arrested without just cause, charged with fictitious crimes, held under excessive bail, and treated frequently with unexampled brutality for the purpose of injuring the strikers and breaking the strike.

In support of this charge, the commission has been furnished with evidence showing that in a number of recent strikes large numbers of strikers were arrested, but that only a small number were brought to trial and relatively few were convicted of any serious offense; that those arrested were, as a rule, required to give heavy bail, far

beyond their means, or were detained without trial until their effectiveness as strikers was destroyed; and that in many cases strikers were brutally treated by the police or by special deputies in the pay of the companies. A number of these strikes have been investigated by public hearings of the commission, by members of its staff, or by other departments of the Federal Government. In each of the strikes investigated the charges as made were in essentials substantiated.

101. THE AMERICAN JUDGE[1]

By Felix Frankfurter

The more complicated society the more it depends upon law for its adjustments. That is a truism to which at least lip-service is accorded everywhere. But the application of that truism to the American political system is strangely unappreciated. Ours is necessarily a legalistic country, because our written constitutions, with the history that lies back of them, potentially make of every question, from the affairs of a village to our international relations, not merely difficulties to be adjusted by peaceful processes, which we call law, but legal controversies to be decided by courts. In no other country is the immanence of legal institutions so deep-rooted and so pervasive as with us; correspondingly, in no other country is a critical understanding of legal institutions so indispensable for laymen. Strangely enough, with the exception of Judge Cardozo's exhilarating little volume, *The Nature of the Judicial Process,* and Dean Pound's *Spirit of the Common Law,* this duty of enlightening laymen has hardly been attempted by the profession.

It is to this great end that Judge Bruce addresses himself. "We need to make the law, and especially constitutional law, intelligible to the ordinary intelligent citizen." Especially constitutional law! "The public needs to be informed both as to the nature and the scope and the limitations of the law." Most assuredly! Here is a task, one would suppose, singularly adapted for the rare experience of Judge Bruce. Who better fitted to interpret the legal institutions under which the American democracy is working out its salvation than one who was reared in English institutions, educated in this country, for many years the associate of Jane Addams and Florence Kelley in reconciling law and social needs, a leader among law teach-

[1] Reprinted from the *New Republic,* April 23, 1924, by permission of the author and the publisher. A book review of *The American Judge* by Andrew A. Bruce.

ers, the chief justice of a state supreme court? How then has Judge Bruce, who so clearly discerns the urgency for enlightenment, helped to give the layman understanding of the law?

Laymen think of "law" mostly as it manifests itself in constitutional adjudications, in industrial controversies and in the administration of criminal justice. The lay emphasis responds to a shrewd instinct. The dominant notes of Judge Bruce's volume confirm the layman's notions as to the chief scope of law.

Throughout the book Judge Bruce seeks to convey the impression that "constitutional law" is some authoritative and impersonal deposit of truth which, for all practical purposes, automatically gives answer when acts of legislature or executive are called into question. "Ours is a government of laws and not of men, and the members of our supreme courts are compelled to announce and decide not what they desire but that which the law and the constitution have authorized" is a typical sentence. But no light is shed as to the process by which the courts ascertain what it is that the Constitution has "authorized." The general impression sought to be conveyed puts Judge Bruce's influence behind the mischievous assumption that our judges embody pure reason, that they are set apart from the concerns of the community, regardless of time, place and circumstance, to become the interpreters of self-determining words with fixed content, yielding their meaning to a process of inexorable reasoning.

Of course Judge Bruce knows better. He knows that judges are not passive interpreters of ready-made "law." He knows that, for the most part and in decisive constitutional cases, they exercise creative power. No attempt is made, however, to enlighten a layman on the complicated process of "interpretation." The judicial process of words and phrases approach mathematical symbols like $\sqcap$ or $\surd$, meaning substantially the same thing to all who have occasion to use them. Other law terms, like "without due process" are not symbols, but labels of a completed and complicated process of judgment and choice. There are thus varying degrees of compulsion behind different words, the differences being due to the words themselves, their setting in the text, their history, their relation to other parts of the law, etc., etc. These distinctions, wholly disregarded by Judge Bruce, have profound consequences in decision-making.

Roughly speaking the Constitution of the United States involved two types of provisions: (1) provisions making specific prohibitions, based on the history of a specific political grievance, or embodying a specific limitation of power in the division of government between states and nation; (2) general standards of fair play and broad

divisions of power between states and nation. These two types of constitutional provisions result in two different types of adjudication, because they rest on different sources of material and provoke differences in mental outlook. As to the first class, the definiteness of the terms, the definiteness of their history, the definiteness of their aim, all combine to canalize within narrow limits the scope of judicial review in the rare instances when their meaning is called into question. The result is a part of constitutional law relatively easy of application because it allows comparatively meager play for individual judgment as to policy. But when we come to the second class, to the broad undefined clauses of the Constitution, we are in a decisively different realm of judicial action. The scope of application is largely unrestricted and the room for play as to individual judgment as to policy correspondingly wide. Simple terms of vast content, like "liberty," and phrases like "without due process of law" are the instruments for judgment upon the whole domain of economic, social and industrial life. The problem is further complicated because we are a federated nation. One set of considerations comes into play when the Supreme Court mediates between the federal government and the states; a totally different set when it sits in judgment upon the social experiments of an individual state.

Surely all this is something that Judge Bruce's "intelligent citizen" ought to be told. Of all this, in his pre-war writing, Judge Bruce was not unaware. But his present readers he darkens by fiction and contradiction, tempered with apologetics. We encounter such orthodox casuistry as: "Generally speaking, the courts have not attempted to set statutes aside. They have refused to enforce them." This particular fiction is very respectable. Judge Bruce, after telling us, in effect, that the Supreme Court is the impersonal voice of sovereign law, and really does not "set statutes aside," goes on to tell us that judges sometimes in fact speak for themselves and not for the Constitution but under the guise of the Constitution.

The layman must be puzzled in his effort to understand the mysteries of constitutional law when so readily assured by Judge Bruce that "if the courts had at times exceeded their authority in passing upon the validity of statutes . . . it is doubtful if any lasting harm has come from the unauthorized activity." How long is "lasting" in Judge Bruce's timekeeping? What is "harm" to him, and how does he measure it? One would judge from the general fearsome temper of the book that popular "unrest" is deemed by him a potent "harm." Surely there can be no greater harm than lack of popular confidence in law and in legal institutions; and Judge Bruce himself tells us that it is by this "unauthorized activity" of our courts "that they

have created a large measure of the popular distrust which now prevails."

Constitutional issues apart, the most challenged activity of the American judge arises in his use of the injunction in industrial controversies. What light has Judge Bruce here to offer? Just this. The injunction is a "prerogative" which "should never be surrendered or taken away. . . . The writ of injunction is the preventive medicine of the law. Surely we are not compelled to stand idly by and see our property demolished and our institutions destroyed. Have not the World War and the failure of Germany to make reparation shown us that an ounce of prevention is worth a pound of cure? Surely it is sometimes wise to prevent the horse from getting out of the barn. Much discretion is necessary in the exercise of the power to issue the writ of injunction. But the power should certainly be recognized."

Surely, also, Judge Bruce might have told his readers of the experience which lies back of the efforts to restrict the use of injunctions in labor controversies. At least he might have quoted, for instance, the following paragraph from Mr. Justice Brandeis in his famous dissent in the Arizona Injunction case:

> It was urged that the real motive in seeking the injunction was not ordinarily to prevent property from being injured nor to protect the owner in its use, but to endow property with active militant power which would make it dominant over men. In other words, that, under the guise of protecting property rights, the employer was seeking sovereign power. And many disinterested men, solicitous only for the public welfare, believed that the law of property was not appropriate for dealing with the forces beneath social unrest; that in this vast struggle it was unwise to throw the power of the state on one side or the other according to principles deduced from that law; that the problem of the control and conduct of industry demanded a solution of its own; and that, pending the ascertainment of new principles to govern industry, it was wiser for the state not to interfere in industrial struggles by the issuance of an injunction.

Judge Bruce writes as though there lay no history of tragic futility between the Debs case and the Wilkerson injunction. For thirty years, the injunction has been used as a familiar weapon in American industrial conflicts. It does not work. It neither mines coal, nor moves trains, nor makes clothing, nor, above all, does it make for peace. As an adjuster of industrial conflicts, the injunction has been a failure. It has been used as a short-cut—but it has not cut anything, except to cut off labor from confidence in the Rule of

Law and of the courts, as its impartial organs. No disinterested student of American industry or of American law can have much doubt that the use of labor injunctions has, predominantly, been a cumulative influence for discord in our national life. Without appeasing, and in fact exacerbating the industrial conflict, judicial intervention in labor controversies through the injunction has planted in the minds of masses of workers, with increasing intensity, the feeling that the courts are the instruments of a partisan policy. This result is inevitable so long as this use of the injunction persists. For the conduct which injunctions in labor cases seek to restrain necessarily involves disputed questions of fact touching men's feelings and motives and opinions. The traditional Anglo-American method for ascertaining such facts is a jury. The social justification of the jury system lies precisely in its utilization of popular cooperation in the enforcement of law. In labor controversy, if anywhere, one would suppose this popular vindication of the law would be resorted to. From the point of view of revivifying a respect for law and regaining order, no less than from any attempt towards decent industrial relations, it is of the essence that the curb upon trade-union action should be administered by the courts only through proceedings in which disputed facts are determined by a jury. Nor is there any just basis in so-called expediency for continuing the disastrous short-cut of the injunction. The direct responsibility of the union for wrongful acts has now been established. Civil redress by the employer can now be had and should be had only through action for damages. So far as acts of violence are concerned, the resources of the state are ample in the criminal law —if it be made effective. Only if trade unions are convicted of wrongful acts not by a single judge but by their fellow citizens—the jury of the vicinage—will it restore belief by the millions of trade-union workers and their friends in the fairness of law and the impartiality of courts.

This brings us to Judge Bruce's treatment of the administration of criminal justice. In the portions concerning criminal law we have a curious hodge-podge of shallow generalities about social causes of crime, politics, inadequacies of our criminal procedure, and "public opinion," that weary scapegoat for a failure to think clearly and hardily. Not that a good deal of what Judge Bruce says isn't so —if only the reader were made aware of it. But his conclusions, even when sustained by proved analysis, lack perspective, guiding detail and impact. Here, for instance, is Judge Bruce's summary of the conditions determining law enforcement in this country: "The curse of the American administration of the criminal law, is our

system of politics, the fact that the under-world has a vote as well as the upper-world, and above all, the short tenure of office of all our public officials." Let anyone compare this analysis with the following summary by Dean Pound of the defects in our system of criminal justice:

> (1) The transition from rural to urban and thence to metropolitan conditions has been met not by intelligent reconstruction, but by patching and addition of members; (2) lack of continuity in administration; (3) rigidity of organization, making adjustment to the exigencies of rapid growth and exceptional diversity of population impossible; (4) a tendency to perfunctory routine growing out of the foregoing circumstances; (5) division of power and diffused, ill-defined responsibility, making it difficult to hold anyone to account for unsatisfactory results; (6) an assumption of versatility on the part of the officials and subordinates, whereby they are expected to do specialized work offhand, in a system of frequent rotation, without any adequate provision for the specialization involved in the large undertaking of enforcing the criminal law in a modern city; (7) want of provision for intelligent study of the functioning of administrative machinery, either by those who operate it or by others.

Here we have the kind of diagnosis which is capable of guiding opinion and furnishes blue-prints for social construction. Such an analysis of defects suggests the problems for reform, of which the most important are the re-shaping of the substantive criminal law, the organization of the administration of justice, adequate provision for petty prosecutions and preventive methods—always remembering, in the words of Mr. Alfred Bettman, "the unescapable influence of the atmosphere, the traditions, the ideals, and the standards of the community itself."

But Judge Bruce is too preoccupied with "selling" the American judge to give a painstaking critique of the problems of present-day law enforcement. The chief aim, apparently, is to clear the courts of all responsibility for the justified discontent with what Senator Root calls "the product" of our judicial system. And so we have an application of most transparent whitewash: "Certain it is that no modern appellate court reverses a judgment unless it is satisfied that a fundamental right has been violated."

In view of his exaltation of our existing system, it is not too surprising, however disheartening, that Judge Bruce "views with alarm" one of the few notable achievements of recent years in procedural reform—the small-claims courts. "Serious dangers are involved in their creation. They are informal and they are presumed to

be informal. Being informal they are often arbitrary. They represent and enforce the justice of the beneficent despot rather than that of the established law." Here is a matter vital to the great masses, and vital to continued confidence in law. What is the basis for this condemnation of the actual working of the small-claims courts? The testimony available is all the other way, as evidenced by the reports at last year's meeting of the American Bar Association and in the report now in preparation for the Carnegie Foundation by Reginald H. Smith, bringing down to date his Justice and the Poor.

One might go on applying the scientific scalpel to almost every page of this book. It is not a congenial task and would only add cumulative evidence to what must be abundantly clear. The book is neither scholarly nor scientific. An exposition of technical problems for laymen makes a particularly exacting demand on scholarship. The paraphernalia and pomp of learning must be dispensed with; learning must be distilled in draughts at once pure and potent. But rhetoric is not the layman's substitute for technical jargon, and a problem cannot be simplified by suppression of its difficulties. Judge Bruce's pages are happily unencumbered by any heavy apparatus of legal learning; unfortunately, they show no traces that scholars have greatly labored in fields from which he brings reports to laymen. If this book were the only witness, Mr. Justice Brandeis, Judge Cardozo, Mr. Justice Holmes, Dean Pound and Dean Wigmore (to mention but a few) might as well not have written. Much as the flavor and substance of scholarship is wanting, the book is still less touched with the scientific spirit. Fear permeates its pages. The sad truth is that Judge Bruce made for the cyclone cellar after his grievous experience when North Dakota went non-partisan, and this book was largely written in the cyclone cellar. A fruitful book in social science cannot be written by a pen moved by fear and dipped in a grievance. And so we have a book by two Bruces, the pre-war, Hull House Bruce, and the post-war, "Red"-fearing Bruce. Both wrote—but with a very different temper, with a very different outlook. In the present book, these two streams of writing are strangely blended. Two different wines do not make a good cocktail simply because one is bitter. Judge Bruce set out to "save the country" instead of enlightening it to save itself.

Beard, (4th Ed.), pp. 622–653.
Mathews, pp. 413–496.
Kimball, *State and Municipal Government,* pp. 238–305.
Ogg and Ray (2nd Ed.), pp. 741–763.
Dodd, *State Government,* pp. 300–324; 325–340; 341–359.

XXVI

STATE CONTROL OVER LOCAL GOVERNMENT

The first city charters in the colonial period were granted by the royal governor acting under the authority of the king. After the Revolution this power was transferred to the state legislature, and there it has remained. The only important limitation upon the state's power to control its municipalities has come through the operation of the so-called "home-rule system." This idea has had a much stronger emotional than practical appeal. True, the state has interfered to a marked degree in local affairs, but twentieth-century developments have created many situations in local government which are not local in character but demand state action; among them are elections, education, public utilities, debt administration, etc. The important development in state control over local government has been its character. The legislatures have realized their impotence to deal with intricate local problems and have granted this power to administrative boards—for the most part with salutary results. The legislatures have had more time for state business, and the local committees have been freed from log-rolling, petty politics, and legislative indifference. A further proposal would have the state create a department of municipal affairs which should be a co-ordinating agency for municipalities and local units so that in all matters their welfare would be safeguarded. No legislature has adopted the idea, but it merits careful consideration.

102. ADMINISTRATIVE CONTROL OF MUNICIPALITIES[1]

By Carleton F. Sharpe

The purpose of this study is to study the origin, development and possibilities of state administrative control of municipal activities. The study is based on the conditions existing in New York state at the present time although some attention will be paid to the general question and to the situation in other states.

It is necessary to understand, first of all, what is meant by administrative control in order to more clearly understand its operation.

[1] Unpublished manuscript. Printed with the permission of the author.

By administrative control we mean that control exercised by state administrative officers and departments over city officials in the day to day administration of their functions.[2] To be more general, it is that control which the central state administration has over the local city administrations.

The basis for state control is the contention that the city is an integral part of the state and as a result some control should be exercised by the state over the local governments. Of course there are other methods of control, such as legislative and judicial, but a comparison of the relative merits of the three methods will be dealt with later. The need for such administrative state control was produced by the industrial revolution and the ensuing changes which it brought about. Before this time the local government was capable of handling its own affairs and each locality was free and independent of the rest of the state, to a large degree. But with improved methods of communication and the development of industry came the concentration of large populations into small areas and the inability of the local government to handle the new functions forced upon them. As a result there was need for some central authority to control the welfare of the state at large. Instead of the old viewpoint of individualism and local government there sprang up a new and more social point of view. The attitude previously had been that the state government was a mere police force but, with the new situation, it took on a new aspect, that of an agency to be used for state-wide benefit.

Of course care had to be taken not to destroy the identity of the local governments and the question arose as to how far this control should be exercised. The general consensus of opinion of authorities on this matter is best summed up by Mill who says: "The principal business of the central authority should be to give instruction, of the local authority to apply it. Power may be localized, but knowledge, to be useful, must be centralized; there must be somewhere a focus at which all its scattered rays are collected, that the broken and colored lights which exist elsewhere may find there what is necessary to complete and purify them. To every branch of local administration which affects the general interest there should be a corresponding central organ, either a minister, or some specially appointed functionary under him; even if that functionary does no more than collect information from all quarters, and brings the experience acquired in one locality to the knowledge of another where it is wanted. But there is also something more than this for the central authority to do. It ought to keep open a perpetual com-

[2] William Anderson, *American City Government*, 1925, p. 66.

munication with the localities; informing itself by their experience, and them by its own; giving advice freely when asked, volunteering it when seen to be required." [3]

To make such a study as will involve these points mentioned above will be the purpose and aim of this thesis.

To begin the study of the problem let us first study the history of state control over municipalities and compare the merits of the different methods. The first attempt at control was exercised by the legislature. This method originated in England and was effective for a time because of the highly centralized government and the fact that parliament was supreme. But, as the problems of municipal administration became more complex, the control was given over to administrative officials early in the nineteenth century. However, before this reform had been accomplished the legislative method of control had been transplanted to this country by the colonists and still exists here to a great degree.

The basis of legislative control is that the city as a corporation securing its identity from the state legislature by means of a charter granted by it, is subject, like all corporations, to its control.[4] The charter is the only point in which legislative control is justified. But when the manifold functions and activities of the cities are taken into consideration with their complex problems of administration and the intense interest of the people in the efficient operation of local affairs, many defects are revealed.

The defect of legislative control lies in the nature of legislation itself. Legislation is the attempt to formulate minute rules for every situation and it can easily be seen that such a task is impossible in that problems of government differ in different localities.[5] For example, in the regulation of public utilities, an attempt to pass legislation to regulate their general problems would be ludicrous in New York state because of the wide differences in the problems presented. As a result special legislation was attempted. Each municipal locality depended on its nearest representative in the state legislature to secure needed legislation. The effect of this was to make special municipal legislation the football of politicians who did not always take into consideration the needs of the localities but more often used the privilege to secure votes. It can easily be seen that the state is ill-adapted to foresee the needs of cities and is often unwilling or unable to solve city problems. The political influence of a city member may produce legislation which is detrimental to the

[3] Anderson, p. 69.
[4] Joseph Wright, *Selected Readings in Municipal Problems*, 1925, p. 140.
[5] Wright, p. 159.

city and state alike. This has been shown many times in connection with the control of municipal indebtedness.

The fact of municipal dependence on the legislature for special legislation coupled with the fact that the city is limited in its powers by the doctrine of express powers as granted to corporations generally, and the lack of constitutional protection of the rights of the cities has made them completely the creatures of the legislature. Such a situation is a severe handicap to the cities in that it prevents municipal enterprise and overburdens the state legislature by placing all responsibility in its hands.

The final criticism of legislative control is the fact that it has no means of enforcing its provisions except in the courts. Such a case might be found where the courts might invalidate a city loan made contrary to law, but in such a case the political effect would be awkward. In the first place it would cause ill feelings among the bond holders of the city toward the city council who authorized the issue, secondly, the judges and prosecuting officers are products of the same political system which controls the city government and the action is liable to be biased, thirdly, the courts can exercise no discretionary power. This third reason, together with the fact that the legislature can only forbid or prohibit, is one of the best arguments against legislative and judicial control. Also if any judicial control is exercised it involves a delay which is costly to the city and state.[6]

Thus, in order to affect a better method of control of municipal administration, the method of administrative control was borrowed from Europe especially that of Prussia. Such a system had grown out of the feudal system in which there was a general supervision by the lord of the affairs of large estates. It provided for local freedom except for the control exercised by the head of the state for the benefit of the state as a whole.

The advantages of administrative control are obvious. Such control involves discretionary powers which are not obtained in legislative or judicial control. No legislature can hope to foresee all the wants of all the cities, nor are these cities or their needs uniform. But any legislature may lay down certain simple and comprehensive rules vesting in administrative authorities the power to apply the rules with such variations as the needs of the city require.[7] Such a system involves the services of a more or less permanent body of experts who interfere in local municipal affairs only to the degree of acting as an examiner, advisor, instructor or assisting body, unless, there is cause for a more serious interference such as inefficient

[6] Wright, p. 150.
[7] Wright, p. 150.

functioning which would be a detriment to the state as a whole. Of course to be really effective such officers should be as far removed from partisan politics as possible and should be experts in their field.

Another advantage of administrative control is that it preserves local spirit and civic interest which are vital to the development of the municipalities and at the same time gives to the state the control necessary to promote the welfare of the state.

To sum up the advantages of administrative control over legislative and judicial control: 1. It permits the use of discretion in the control of cities; 2. It lessens partisan control of municipalities; 3. It somewhat limits the evils of special legislation; 4. It avoids the delay and injustice of judicial control; 5. It has brought about a more prompt and efficient state control in those fields where state administrative control is desirable; 6. It preserves local spirit and civic interest.

103. THE ANTITHESIS OF HOME RULE[1]

By Ira W. Stratton

I

The Constitution of Pennsylvania, adopted in 1874, permits of the classification of cities. The act of May 23, 1874, provides for three classes. Since that time, the legislature sought to extend the number of classes of cities from three to five, and again to seven, but these acts were declared unconstitutional, it being held that the power of classification permissible under the constitution having once been exercised by the legislature in the act of 1874, it was not competent thereafter to extend the number of classes as originally fixed.

First Class Cities are those containing a population of one million or over (Philadelphia). Second Class Cities are those containing a population of one hundred thousand and under one million (Pittsburgh and Scranton). Third Class Cities are those containing a population under one hundred thousand.

II

The press bulletin from Washington gives the population of Reading, Pa., as 107,784, for the 1920 census. When in the course of

[1] Reprinted from the *National Municipal Review*, January 1921, by permission of the editor.

time these figures are officially transmitted to the state authorities, then becomes operative the Act of June 25, 1895.

"Whenever it shall appear by any such census that any city of the Third Class has attained a population entitling it to an advance in classification, it shall be the duty of the Governor, under the great seal of the Commonwealth, to certify the fact accordingly, which certificate shall be entered at large upon the minutes of the council of such city, and recorded in the office for recording of deeds of the proper county. . . . At the next municipal election . . . the proper officers shall be elected to which the said city will become entitled under the change in classification."

A state constitutional amendment was adopted by vote of the people in 1909—which provides for all regular municipal elections to be held in odd numbered years. The next municipal election will therefore be in November, 1921, and the officers then elected will take office the first Monday in January, 1922. This date, under existing laws, will be the time when Reading, Pennsylvania, will become in fact a Second Class City of Pennsylvania.

The laws of Pennsylvania giving charter rights to cities of the second class differ in many respects from those of third class cities. In third class cities, the mayor and four councilmen meet as council and are clothed with legislative and executive power; each member also being head of a department. In second class cities, the mayor is not a member of council but he has full executive power, has the right of approval or veto of all legislation passed by council, and appoints, subject to the approval of council, all department heads. Council has all legislative power vested in it.

There are many other minor features of material difference. Unless care is exercised during the period of transition, the expense of operating a second class city will be very much greater than that of a third class city. A judicious interpretation with common sense application is highly necessary.

The law is clear about councilmen, their powers and terms of office, but acts pertaining to other officials are somewhat hazy. There is no out-standing precedent to follow: Pittsburgh and Scranton both went through the fire of the 1901 "ripper act," and it is hoped that Reading will escape a repetition of this disgraceful experience. It is possible that the legislature of 1921 will clear the atmosphere.

The legislature of 1919 proposed two amendments to the State Constitution. Should these pass the 1921 legislature and subsequently be approved by vote of the people, cities of Pennsylvania will be reclassified into seven classes and home rule given them.

Such action may find Reading in the course of a few years again changed to another class.

104. MUNICIPAL HOME RULE[1]

LEGISLATIVE HOME RULE

In contrast with the prevailing practice of detailed legislation on municipal government, there are a few instances where state legislatures have enacted measures providing in comprehensive terms that cities should have power to amend their charters or adopt new charters. Thus the Iowa Act of 1858 for the incorporation of cities and towns, passed after the prohibition of special legislation in that state, provides for the amendment of existing city or town special charters on petition of one-fourth of the voters, or submission by the local legislative body, and approved by a referendum of voters. This Act was upheld by the Supreme Court of Iowa, and is still part of the statute law of the state, though it does not appear to have been used very much.[2]

Reference was made to this Iowa law in the Illinois Convention of 1869–70; but no similar act has been passed in this state. It may be noted, however, that it has been suggested, in a Supreme Court opinion in Illinois, that: "The legislature . . . might provide a system by which municipalities should become incorporated, or for changing and amending existing charters, in the discretion and through the agency of those to be affected." [3]

Laws somewhat similar to that of Iowa have been enacted more recently in a number of other states: Louisiana in 1896, South Carolina in 1899, Mississippi in 1900 and Florida and Connecticut in 1915.[4] The Mississippi Act has been applied in several

[1] From *Illinois Constitutional Convention Bulletin,* No. 6 *Municipal Home Rule,* pp. 406–415.

[2] Laws of Iowa, 1858, ch. 157; Code of 1897, S. 1047; Ex parte, Pritz, 9 Iowa 222 (1870); Davis & Bro. *v.* Woolnough, 9 Iowa 104 (1859); Hetherington *v.* Bissel, 10 Iowa 145 (1859); Voss Phul *v.* Harmer, 29 Iowa 22 (1870). It may be noted that in the last of these cases, the original special charter of the city (Newton) contained a provision authorizing its own amendment, although this is not referred to in the judicial opinion.

[3] People *v.* Cooper, 83 Ill. 585, 590.

[4] A Louisiana Act of 1896 provides that new charters may be adopted and promulgated by any city or town except New Orleans, on petition of a majority of the property owners and ratification by popular vote. No test of this act appears to have been made in the courts; and it may be doubted if it has been used.

Acts of the General Assembly 1896, p. 190; Revised Statutes, 1915, Secs. 4865–70.

cases, and has been upheld by the Supreme Court of the State.[5]

The provisions of these laws are brief and crude, and do not attempt to solve the difficult problems which arise as to the scope of municipal powers; while very little has been done under their authority. It is, of course, always possible for the legislature to repeal the act, or to override any locally adopted charter provisions by subsequent legislation of its own.

Somewhat similar acts, passed in Michigan (in 1899) and Wisconsin (in 1911) have been held to be invalid, as an unconstitutional delegation of legislative power.[6]

A New York "home rule" law of 1913, granting an extended list

In South Carolina a similar act for the amendment of town and city charters was passed in 1899, with a provision that the amendments adopted should be filed with the Secretary of State.

Acts of the General Assembly 1899, No. 42; Civil Code 1912, Sec. 2985. See Hill *v.* Abbeville 59 S. C. 407 (1901).

[5] The Mississippi act of 1900 provides for the amendment of independent charters by the mayor and council on the approval of the governor and attorney general as consistent with the constitution and laws of the United States and the state constitution; but on protest by one-tenth of the electors, the amendments must be submitted to popular referendum. This act has been applied in several cases and has been upheld by the Supreme Court of Mississippi, one case holding that under it a city having a special charter might adopt an amendment providing for the owning and operating of an electric railway and issuing bonds therefor.

Laws of Mississippi, 1900, ch. 69; Code of 1906, Sec. 3444; O'Flinn v. McInnis, 80 Miss. 125 (31 So. 584) (1902); Yazoo City *v.* Lightcap, 82 Miss. 148 (33 So. 949) (1903). It was noted that the Mississippi Code of 1857 had provided that applicants for corporate charters (including municipal corporations) should prepare a charter, stating the powers to be exercised, and on approval by the Governor and Attorney General these powers should be vested in the corporation. Similar provisions had been continued in later laws and the Code of 1892. Adams *v.* Kuykendall, 83 Miss. 571 (35 So. 830) (1904); Love *v.* Holmes, 91 Miss. 535 (44 So. 835) (1907). "The Act of the Legislature has given municipalities operating under special charters the power to so amend their charters as to do anything they may wish, provided only that the amendment does not conflict with the enumerated laws."

In 1915 two other state legislatures passed acts of the same nature. A Florida act authorizes every city and town to change the provisions of its charter as to organization and powers of offices and boards, but not to enlarge its corporate powers, by means of an elected charter board and a popular referendum. A Connecticut act provides that any town governed under a special act, or any borough or city, may amend its charter, through a charter commission and a local referendum. Acts relating to local or police courts may not be amended in this way.

Florida Acts and Resolutions 1915, ch. 6940 (No. 134); Connecticut Public Acts, 1915, ch. 317.

[6] Elliot *v.* City of Detroit, 121 Mich. 611 (1899); State *v.* Thompson, 149 Wis. 488 (1912).

of powers to all cities, enumerated in 23 articles, has been largely ineffective, first because of the doubt as to the legal capacity of the legislature to devolve so much power of local legislation, and second because of provisions in existing charters.[7]

CONSTITUTIONAL HOME RULE

Beginning with Missouri in 1875, thirteen states have adopted constitutional provisions authorizing cities (and in some cases also villages and counties) to frame and adopt their own charters of municipal government. These provisions have been frequently used; and an examination of this development and its operation will be of service in relation to the problem in Illinois.

In the Missouri Constitution of 1875, provisions were adopted authorizing any city of over 100,000 population to frame and adopt a charter, with special provisions for the city of St. Louis. Under these provisions, new charters were prepared and adopted by St. Louis in 1876 and by Kansas City in 1888; and revised charters were prepared and adopted by Kansas City in 1908, and by St. Louis in 1914.

Four years after the Missouri Constitution, a similar provision was adopted in the California Constitution of 1879; but San Francisco (the only city of over 100,000 population) did not adopt a new charter until 1898. In the meantime the population limit in the California Constitution was reduced in 1887 to 10,000 and in 1892 to 3,500; and, beginning with Los Angeles in 1889, more than thirty cities have framed and adopted new charters. In 1911, a constitutional amendment was adopted in California authorizing counties to frame and adopt local charters; and this has been acted on by two counties.

In 1889 the constitution for the new state of Washington included a provision authorizing cities of over 20,000 population to frame and adopt their own charters. Seattle and Tacoma adopted new charters under this plan in 1890; and these have since been followed by Spokane and Everett, all but one of the cities of over 20,000 population in the state.

The next state to adopt this method was Minnesota, where a constitutional amendment was ratified in 1896, authorizing any city or village to frame and adopt its charter. Within a few years new charters had been adopted by St. Paul and Duluth, and several smaller

[7] Seth Low in *New York Constitutional Convention* (1915) *Revised Record* I, 1968.

cities; and more than forty cities and villages have now adopted charters by this method.

In 1902, a constitutional amendment was adopted in Colorado, forming a consolidated City and County of Denver; and authorizing it, and also each city or town with 2,000 population, to make, amend and revise or replace its charter. Under this provision Denver, Colorado Springs, Pueblo and several other cities have adopted new charters.

Thus far the movement for constitutional home rule had progressed but slowly; and of the five detached states where local charters were authorized only in two (California and Minnesota) had many cities acted under the provisions. But beginning in 1906, more rapid headway was made. Oregon adopted a home rule provision in 1906, Oklahoma in 1907, Michigan in 1908, four states (Arizona, Nebraska, Ohio and Texas) in 1912, and Maryland in 1915. In Oregon, Michigan and Ohio these provisions apply to all cities and villages; in Oklahoma to cities of more than 2,000 population; in Arizona to cities of over 3,500 population; in Texas to cities of over 5,000 in population; and in Maryland only to the city of Baltimore and to counties.

Active use has been made of this authority in all of these states except Arizona and Nebraska. In each of the states of Oregon, Oklahoma, Michigan, Ohio and Texas, more than a score of cities and villages have adopted new charters; and other cities and villages (in Oregon, Michigan and Texas) have amended earlier legislative charters. Among the larger cities in these states with home rule charters are Cleveland, Cincinnati, Dayton, Detroit, Portland (Oregon), and Baltimore.

Altogether more than 200 cities and villages in the United States are now operating under home rule charters, framed and adopted under constitutional provisions. These include fifteen of the thirty largest cities in the country.

A constitutional amendment authorizing home rule charters was submitted in Wisconsin in 1914, but failed of adoption. The proposed New York Constitution of 1915 contained a series of complicated provisions for home rule city charters; but this constitution was defeated.

A proposed amendment authorizing legislative home rule was approved by the New York legislature in 1917, but has not been repassed as required. A proposed home rule amendment has been approved by the Wisconsin legislature in 1919, but must be repassed at a later session. In Utah a proposed amendment, submitted by the legislature in 1919, will be voted on in 1920.

CHARTER-MAKING PROCEDURE

In most of the constitutional provisions for municipal home rule, the main emphasis has been laid on the authority to frame and adopt charters. In most cases the procedure for charter-making is prescribed in the constitution; but this is not done in Oregon, Michigan and Texas; and in Michigan and Texas the constitutional provisions have been supplemented by legislation regulating the procedure and methods to be followed.

It is urged in support of detailed constitutional provisions on procedure, that unless these are definitely set forth in the constitution the grant of municipal home rule is merely formal and directory, and remains subject to legislative control in the enabling act. On the other hand it may be said that the grant of substantive powers is of more importance than the details of procedure; that the variations in the procedural provisions in the various constitutions and their frequent amendment indicate the absence of agreement as to the best system of procedure; that none of the constitutional provisions is entirely self-executing; and that in the states where the procedure is regulated by statute workable provisions have been adopted and there has been no serious complaint that the legislature has abused its power, while changes in detail may be more readily made.

In ten of the thirteen home rule states (all except Minnesota, Oregon and Colorado) the local councils may initiate charter-making proceedings; in eleven states (all except Missouri and Washington), the initiative may be begun by popular petition; and in eight states (all but the five named above) either method may be used.

All of the home rule states except Oregon provide for a special body to draft the charter, styled a board of freeholders or charter commission. These bodies consist of from 11 to 21 members, elected at large, except in Oklahoma and Michigan (where members are elected by wards) and in Minnesota where they are appointed by the district judges. In Oregon proposed charters or amendments are presented by initiative petition or by the local council. In Maryland county charter boards have only five members.

In seven states, only freeholders may be members of the charter boards. In several states there are special residence requirements. In some states any qualified voter may be chosen. Most states provide no compensation for the charter board; but compensation is authorized in Colorado and Michigan.

Most states fix a time limit for the preparation of the charter, ranging from 30 days in Washington to one year in Ohio. From 90 days to six months are the more common periods.

In all the home rule states proposed charters and amendments must be submitted to popular ratification. In six states provision is made for publication in local newspapers; in California charters must also be printed in pamphlet form for distribution on application; and in Ohio, Oregon and Texas a copy of proposed charters must be sent to every voter before the election. It is usually provided that the ratification election must come within certain time limits after publication—generally from 20 to 90 days.

A majority of those voting on the charter is in most cases sufficient for ratification. In Texas, however, there must be a majority of the total vote at the election. Missouri and Minnesota require three-fifths or four-sevenths, respectively, of those voting at the election, a provision which has increased the difficulty of adopting charters.

In several states provision is made for submitting charters to state authorities before they go into effect. In California, all charters are transmitted to the legislature for approval or rejection as a whole. In Arizona and Oklahoma, charters are submitted to the Governor, who shall approve them unless in conflict with the constitution or (and) laws of the state. In Michigan the legislative act provides that proposed charters before ratification shall be submitted to the Governor, and if he disapproves a two-thirds vote of the charter commission is required. Thus far no charters have been disapproved in these states.

Most states provide that official copies of charters and amendments shall be filed with the Secretary of State; and in several states it is specifically provided that the courts shall take judicial notice of such charters.

Amendments to former legislative charters may be adopted under the home rule procedure in Oregon, Michigan and Texas, without first adopting a new charter by this method. In the other home rule states, amendments may be made only to home rule charters. The procedure for amendments is similar to that of framing a new charter, except that a special charter board need not be organized. In most cases amendments may be prepared either by the local council or by popular petition. In Missouri and Washington amendments may be proposed only by the council; and in Colorado only by petition. The proceedings for the submission and ratification of amendments is the same as for new charters. . . .

REQUIREMENTS AND LIMITATIONS

Most of the home rule provisions of state constitutions include, along with the power to adopt charters, certain mandatory provisions, and some negative restrictions and limitations. In Missouri the charter must provide for a mayor and for a bicameral council, one branch of which shall be elected at large. In Minnesota, the charter must provide for a mayor and a council of one or two branches, and if bicameral at least one branch must be elected at large. The Colorado amendment requires the City and County of Denver to designate officers who shall perform the duties of county officers, and to provide that the departments of fire and police and of public utilities and works shall be under civil service regulations.

The Michigan Constitution prohibits cities and villages from abridging the elective franchise, loaning their credit, or imposing taxes for other than public purposes; it requires a three-fifths vote for acquiring public utilities or granting irrevocable public utility franchises; and it requires the legislature to limit their powers of taxation and debt. The legislature has further required that the charter provide for a mayor, a legislative body, a clerk and treasurer, and establish regulations for the conduct of elections and a system of accounts.

In the Ohio provisions, laws are authorized to limit the power of cities to levy taxes and incur debts, and to require financial reports and the examination of municipal accounts.

The long and detailed provisions in the California constitution, while in form adding to the grant of powers, inevitably tend to limit the freedom of local action, as is also indicated by the frequency of their amendment.

Some limitations on municipal powers are necessary, and are recognized by most advocates of the home rule charter system. Such provisions as those in the Michigan and Ohio constitutions continuing legislative control over taxation, debt, financial reports and accounts, and the police power of the state, are not in conflict with the general principle of home rule in local affairs.

But if the grant of municipal home rule is to be effective, the detailed provisions of some of the constitutional provisions indicate the danger of too minute regulation in the constitution, which may have the effect of substituting a more drastic and rigid constitutional control for a more flexible system of legislative control. Requirements as to specific officials, specific financial limitations, and even detailed regulations as to charter procedure are matters outside the

field of constitutional principles. Such provisions are necessarily subject to change, and are likely to hamper future development, even if the practice of some states of adopting numerous amendments to the constitution at every election is introduced.

105. STATE SUPERVISION OF MUNICIPAL ACCOUNTS[1]

By Wylie Kilpatrick

"H. Bell" was the unchallenged entry on the payroll of a New Jersey city for four years. And for that length of time a horse—presumably a person surnamed "Bell"—was regularly carried as a salaried employee while the monthly wages were pocketed by a foreman who obligingly signed "H. Bell" on the payroll as a convenience to "one of his gang."

Defalcation and peculation by municipal officers, some no less humorous, have formed the more spectacular reason for state supervision of municipal accounts. Following the enactment of the Indiana accounting law of 1909 it was discovered that in a certain county several officials used rooms in the court house in which to gamble, and when their own funds ran short they issued county warrants in payment of fictitious claims. The pot in one instance must have broken wrong for a player, for one officer filed claims for $425 for fountain pens!

How narrowly the charge of defalcation should be modified by qualifying adjectives or how strongly it should be emphasized is a subject largely covered by a smoke-screen of muddled accounting, court room gossip, and unverified muck-raking. It is well to remember, however, that when the first thorough investigation of municipal accounts is made by a state bureau, numerous embezzlements are almost invariably discovered. During the first year of state inspection in Indiana, $186,044 was recovered of funds improperly diverted from the public treasury. Over $6,000,000 has been recovered in Ohio since the establishment of the state bureau of accounts.

Whatever the extent of financial lawlessness by municipal of-

[1] This article was written as a part of the author's work as a student in the National Institute of Public Administration. The legal provisions forming the basis of discussion have been compiled in tabular form. A number of typewritten copies of this table have been prepared by the New York Bureau of Municipal Research and will be furnished at cost to those interested. Reprinted from the *National Municipal Review*, May 1923, by permission of the editor.

ficials, past or present, their proven dishonesty in certain instances has aroused a public attention to the need for more exact accounting methods and the fixing of responsibility for auditing upon a centralized agency. Spectacular lawlessness—even though it be isolated—has done more to hasten the enactment of state accounting laws than more reasoned briefs of financial policy.

LEGISLATION WITHOUT ADMINISTRATIVE SUPERVISION

The original method of exercising state control over municipal finance was the characteristic solution resorted to by many reformers, the setting up of statutory or constitutional prohibitions against badness on the part of the officers without the use of administrative supervision. The effect of these inhibitions is now recognized. A wilful disobedience at the worst, or a haphazard obedience at the best, followed the passage of state laws governing the accountability of local officers in their financial transactions. When no method of law enforcement or administration was provided, inevitably the observance of the law was optional with municipal officers. Usage and routine in local offices or the precedent of previous officers offered handy alibis to officers who for reasons of their own may have preferred to overlook state laws. The continuous disregard of statutory provisions may, in fact, indicate no wilful disobedience, for the municipal officer may be in the anomalous, though not surprising, position of being unacquainted with state laws expressly designed to govern his duties. If the legal provisions are complex, if no attempt is made to outline and interpret their requirements to him, or if the current session laws are not even available to him, the municipal officer will administer local finance in innocent disregard of contrary laws.

However futile may be laws whose observance is optional in practice, the basic reason prompting state supervision is found to a larger degree in another condition. Can the responsibility of planning a scientific accounting system and establishing a procedure for its operation be placed upon local officers? A vast body of experience proves that a technical duty of this nature requires expert assistance which can be most conveniently provided by a state bureau. A municipal officer, usually elected for a short term and receiving a low salary, seldom has the training which fits him to devise an accounting system. Less frequently has he the time to inaugurate acceptable methods during his short tenure in office. If the standards of procedure are the haphazard precedents of a sundry collection of office-holders who preceded him, the administration of the local of-

ficer can hardly be expected to measure up to the requirements of scientific accounting.

SELF-INTEREST DRIVES STATES TOWARD SUPERVISION

Irrespective of any theory as to the desirability of supervising municipal finance, the state finds itself adopting the methods of supervisory control in order to safeguard its own interests. A part, and usually no small part, of the state's revenues are collected by local officers and transferred from city or county treasuries to the state. Dishonest or lax methods by municipalities may be the direct cause of misappropriation or diversion of funds from the state treasury. Equally serious is the indirect effect upon the financial standing of all communities resulting from lawlessness in any one city. The gutting of a town treasury must react adversely upon the credit of neighboring cities. Investors cannot view municipal bonds without suspicion when fraudulent practices are unearthed in even one city of the state.

SUPERVISION STIMULATED BY REPORT OF NATIONAL MUNICIPAL LEAGUE

Wyoming by provision of its state constitution created the office of state examiner in 1890, the year of her admission into the Union. The legislative act of that year defining the duties of the examiner was the first law placed on the statute books of any state providing for adequate state supervision of local accounts.

A number of laws prior to this date pointed the way for the more comprehensive statutes which were passed in following years. Supervisory power over county officers was given the Indiana state auditor in 1852. Inspection of county officers again found expression in law through a Minnesota statute in 1878. Wyoming was the first state to provide for uniform municipal accounting by the law of 1890. Sentiment for adequate state supervision was crystallized in a report before the National Municipal League convention in 1898. Three phases of supervision were recommended: prescribing and installing uniform accounting for municipalities, collecting and publishing comparative statistics, and making inspections of local accounting offices. These three aspects of the proposal have continued to be the cardinal principles around which legislation has been framed in the last twenty-five years.

In a halting manner various states have felt their way towards enacting the program outlined before the National Municipal

League. The process in many states has hardly been conscious, the first steps often being taken without recognition that they would lead to complete supervision. Massachusetts is a state in instance. In 1869 the Massachusetts bureau of statistics of labor was started, a bureau with no duties relating to local government. A division of manufactures was added, and finally, in 1906, the collection of municipal statistics was made a duty of the bureau of statistics.

The broadening of bank examination to include auditing of municipal accounting has been a development in several states. The duties of the public examiner of South Dakota, dating from 1887, included the auditing of banks as well as of state institutions. By 1911, the work of examining banks took the time of the examiner to such a degree that a separate officer, the executive accountant, was created to supervise public accounts, including state institutions. Minnesota illustrates a curious manner of growth of the movement. The 1878 act, previously mentioned, established a public examiner to examine banking institutions as well as state and county offices. The examiner was given partial jurisdiction in 1891 over the accounts of St. Paul, this power being extended to Minneapolis fourteen years later. Not until 1913 was his jurisdiction extended completely over the municipalities of the state.

The collection of taxes has been another angle from which a beginning towards supervision was made. The Wisconsin legislature directed the tax commission to inquire into the methods of municipal accounting and only following this investigation was the 1911 law enacted providing for partial state supervision. A frequent approach to the question has been by state inspection of city or county offices handling state funds. Three states today limit the scope of their inspection of local accounts to county officers concerned with state finances, Alabama, Kentucky, and Maryland. A much larger number, seventeen, provide for the inspection of county as well as city or town finances.[2]

After the passage of the Wyoming law, twelve years elapsed before adequate methods of supervisory control found legal expression. Ohio in 1902 established the state bureau of inspection and supervision of public offices. The Ohio bureau in the two following decades continued to be the model after which many laws were patterned. Important enactments followed in more rapid succession. State examiners of public accounts or bureaus of municipal accounts were provided in New York in 1905, Massachusetts and Iowa in

[2] Indiana, Louisiana, Minnesota, Mississippi, Montana, New Hampshire, New Mexico, New York, North Dakota, Ohio, South Dakota, Virginia, Washington, West Virginia, Wisconsin.

1906, Minnesota in 1907, and Indiana in 1909. Nearly every succeeding biennium has witnessed the passage of one or more state laws. The legislatures of New Jersey, New Hampshire, and New Mexico in 1921 made revisions of their accounting methods which are among the latest laws extending the scope of state supervision.

The extent of adequate state audit of its own accounts and offices, while not specifically relating to local finance, shows the degree to which supervisory control is being recognized as an accepted principle. Thirty-nine states make provision for some form of audit of state offices by the bureau which examines local accounts. Of this number, twenty-one make mandatory an audit yearly or oftener. Installation of an accounting system, uniform for offices of the same grade, is required in thirty-three states. A smaller number, twenty-five, enable the supervisory bureau to keep in close touch with fiscal operations of the state through periodic reports submitted by state officers and institutions.

It is significant that of all the states in the Union, only one—Rhode Island—has no legal requirement for some form of supervision of accounting, state or municipal, by a centralized agency of the state. The law in many instances may be inadequate. Its administration may be faulty. But the presence of provisions on the statute of forty-seven states leaves no doubt that supervisory control is today a recognized part of state administration.

FINANCIAL REPORTING

The value of the Massachusetts experience in collecting comparative municipal statistics has resulted in numerous legislative provisions patterned on the procedure of the Bay State. Fifteen states [3] require municipalities to make annually a financial report to the state, nearly all of whom provide for the publication of the reports in comparative tables. A second series of sixteen states [4] require some form of local reporting of finance, the requirement usually being confined to county officials or to those handling state funds.

The scope of the state publication is illustrated by the analysis printed by the New York state comptroller which contains:

1. Summary of financial transactions (classification of receipts, payments, and balances).

[3] California, Indiana, Iowa, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, South Carolina, Washington, West Virginia, Wisconsin.

[4] Colorado, Connecticut, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Nevada, Oklahoma, Oregon, Tennessee, Texas, Vermont, Ohio, South Dakota, Washington.

2. Analysis of income according to the nature of receipts and revenues.

3. Summary of payments classified by function performed.

4. Outstanding indebtedness and interest charges analyzed as to character of the obligation.

These four elements are normally found in every state publication of municipal statistics, although supplementary statements are always added by individual bureaus. The receipts and outlays for municipal industries and the valuation of property are important tables in several reports. The mass of undigested statistics, which the report may readily become, has been interpreted in a readable fashion by several bureaus, notably those of Ohio, New York, and Massachusetts. Charts are printed in their reports, showing graphically the increase or decrease in the cost of various functions as well as graphical representations of revenues and payments.

The better class of publications of municipal finance are now complete as reference volumes of financial information. The next step in their improvement, difficult though it may be, is to correlate physical with fiscal data. Of what value is a comparison between the cost of education in two cities if we do not know the degree of service rendered, if the number of school children and teachers and salaries is not revealed. This illustration holds true for most of the municipal services, whether it is fire and police protection or the laying of sewer systems. The limitations of any governmental report of comparative statistics are well recognized. To the voter who wished to judge the comparative performances of officers, statistics which are not interpreted over a common denominator are useless. If corresponding physical data, however, can be added to the fiscal statistics at present contained in the publications, the voter will be given a gauge to measure municipal services and officers. The utility of the publication will be multiplied when a municipal officer of any nature, whether street or public work, can turn to it for comparative information expressed in concrete terms of cost and service.

UNIFORM ACCOUNTING

Following the first state law requiring uniform municipal accounting, that of Wyoming in 1890, twelve other states [5] have made mandatory the requirement for the installation of uniform methods in local accounting offices. Sixteen other states have legal provisions

[5] California, Indiana, Iowa, Minnesota, Montana, New Hampshire, New Jersey, New York, North Dakota, Ohio, South Dakota, Washington.

for an accounting system, six [6] of whom limit the requirement for uniformity to county offices. By request of the locality or recommendation of the supervising bureau, an accounting procedure will be installed in a local office in seven states [7] while in the remaining three states,[8] whose statutes deal with the subject, uniform accounting applies only to county offices handling state funds.

Uniform accounting is *"merely the enforcing of adequate standards of performance."* The state must take notice of the methods of a particular office because its laws set standards of conduct which are inoperative under faulty accounting. That the procedure is uniform is the natural result of determining what standard is desirable. The drawing of comparative statistics between municipalities would be hindered, if not made impossible, without uniformity in the primary accounts. Uniformity is required, of course, only as between officers of the same class and function.

The actual administration of accounting installations has encountered obstacles when the attempt was made to impose hastily a complete system throughout the state. In Iowa the state auditor declared after an attempt "to install a system offhand that it was necessary to abandon the original plan and build anew as experience pointed the way." The procedure followed by Wisconsin, devised to avoid administrative friction, provides for:

1. Municipalities desiring to adopt the system are required to make formal application guaranteeing to pay the (installation) costs.

2. Preliminary surveys are then made of the conditions to be met in order to devise the system.

3. A system of double-entry bookkeeping is provided, designed to secure:

(a) A complete record of all municipal transactions on an accrual basis.
(b) To centralize the records of municipal activities in the clerk's office.
(c) Continuous audit of all financial transactions by some responsible local official.
(d) Methods of accounting adapted to the capacity of non-experts and changing officials.
(e) Uniformity enough to produce comparable results and at the same time elasticity to meet varying conditions.

[6] Colorado, Georgia, Idaho, Michigan, Missouri, New Mexico.

[7] Louisiana, Massachusetts, Nevada, Pennsylvania, Virginia, Vermont, Wisconsin.

[8] Kansas, Kentucky, Maryland.

(f) Information of municipal activities by reports to the state commission.

(g) A budget system to furnish the public with information regarding expenditures.

4. In installing these systems all officials concerned are carefully instructed how to keep them. Usually a period of from two to ten months of the financial history of each municipality is re-written under the new system which serves as a guide for future transactions.

5. Subsequent inspections are provided so that each system may be inspected to determine whether the records are kept properly.[9]

EXAMINATION AND AUDIT

The maintenance of financial standards as outlined in state laws and detailed in accounting procedure cannot be entrusted to an automatic self-working. As a necessary corollary to setting up of the machinery is its operation by corps of inspectors of the state supervisory office. Field inspectors who travel from office to office examine municipal accounts, preferably once a year.

The need for an independent audit of municipal accounts by an outside agency is recognized in the laws of thirty-six states. Adequate provision for a compulsory examination once a year is required by the statutes of fourteen states.[10] In five states the requirement is optional and may be met when the state agency deems desirable or the locality requests an audit.[11] An occasional examination, or one confined to county offices, is the scope of the audit in sixteen states.[12] Mississippi is distinctive in using the revenue agent plan under which the agents are given *carte blanche* authority to unearth any peculations by local officers that they may find—and get a "slice" of the recovered money.

A very inadequate method of checking local finance has been resorted to by a few states in requiring the submission of detailed reports to the state agency. The checking up of these reports may or may not reveal the true condition of the municipality, depending upon the accuracy and honesty of the reporting officers.

[9] Report of the Wisconsin Tax Commission, 1916.

[10] Indiana, Iowa, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, South Dakota, Virginia, Washington, and West Virginia.

[11] California, Louisiana, Massachusetts, Wisconsin, and Wyoming.

[12] Alabama, Arkansas, Colorado, Delaware, Georgia, Idaho, Kansas, Kentucky, Maryland, Michigan, Missouri, Nevada, Oklahoma, Florida, Tennessee, Vermont.

ADMINISTRATIVE ORGANIZATION

A variety of organization is provided by the state statutes shading off from an elaborate staff organization solely concerned with municipal finance to the appointment of a special investigator by the governor. Frequently, the state administrating bureaus are in the department of the auditor of the state.[13] Equally prevalent has been the practice of creating an independent agency variously named "public examiner," "executive accountant," or "state accountant."[14] The chief of this agency is responsible directly to the governor or to a state board of examiners.

In two states, Wisconsin and West Virginia, the supervising agency is under the state tax commission, which has partial jurisdiction also in Oregon and South Carolina. In those states in which the state government has recently been reorganized, the bureau has been placed in the department of finance. California, Idaho, Illinois, Nebraska, and Utah have found that the logical place for the agency is in that department.

A surprising confusion exists in several states by distributing authority among more than one agency. Three states, Connecticut, Oregon and South Carolina, have seen fit to allow separate officers to exercise supervision while Mississippi occupies the unhonored position of having a three-headed control. In that state localities report the condition of their finances to the state auditor, the revenue agents investigate accounts, and as an extra precaution the governor may appoint special accountants, perhaps to check up the revenue agents as well as the municipalities.

The New Jersey system, unique to that state, deserves mention. The field work of the department of accounts is not done by regular state employees, for the department maintains a list of municipal accountants who, upon registration, are empowered to audit local accounts. The municipalities, under mandate of being examined at stated intervals, hire a registered accountant whose certified report is submitted to the state department.

CLEARING HOUSE FOR INFORMATION

The greatest promise for future usefulness of the state supervising bureau hardly consists in the formal accounting procedure devised or

[13] Arizona, Colorado, Connecticut, Iowa, Maine, Maryland, Massachusetts, Michigan, Missouri, Nevada, New York, New Mexico, North Carolina, Ohio, and Vermont.

[14] Alabama, Delaware, Indiana, Kansas, Kentucky, Louisiana, Minnesota,

in local audits made. Possibly in the use of the state office as a clearing house to which municipalities naturally turn for advice and information, the existence of the bureau finds its best justification. The advisory function of the bureau grows as the staff gradually builds up confidence in its work among the municipalities. The volume of daily mail containing inquiries about current problems of finance, the conversations held in the bureau's office, and the aid which the staff gives while inspecting local offices, form a rough index as to how far the bureau has "dug in."

In no field can the bureau be of more use as an advisor than in law. To the local officer it can outline the requirements of the latest session laws. To the state legislature it can submit constructive measures of reform based on the data it has collected within the state and close observation of the operation of experimental laws elsewhere.

The advisory function of the bureau provides it with the needed opportunity to correlate the three-fold aspect of its work—installation of uniform accounting systems in municipal offices, examination of local accounts, and the compilation of comparative municipal statistics. A bureau having the confidence of municipal officers throughout the state may extend the standard accounting methods with their ready acquiescence or upon their invitation. Audit of municipal accounts by a state inspector is not resented when the local officers are accustomed to view the bureau as a partner in working out fiscal problems. If the municipal officers look to state publications of statistics as a guide, coercive measures need not be used to compel the submission of the detailed reports required by law.

The trend towards complete adoption of supervisory control of municipal finance by the state has been so gradual that it has escaped the attention which more spectacular changes attract. To paraphrase Blackstone's dictum on the growth of English common law: state supervisory control has been secreted from the intestines of financial administration. The methods by which it now seeks to function are but the natural aftermath of the state's duty to protect the integrity and credit of public finance within its boundaries; they have been and will be extended piecemeal as the circumstances in each state prove the need for their adoption.

Montana, New Jersey, North Dakota, Oklahoma, South Dakota, Texas, Virginia, Wyoming.

Mathews, pp. 499–514.
Kimball, *State and Municipal Government,* pp. 374–392.
Ogg and Ray, (2nd Ed.), pp. 54–73.
Dodd, *State Government,* pp. 54–73.

XXVII

FORMS OF CITY GOVERNMENT

Three forms of municipal government are in operation in the cities of the United States. The first is the mayor-council plan, with its many variations. This plan, which rapidly gained favor after the first twenty-five years of the nineteenth century, provides for an elective mayor and other officers, and an elective council. As administration grew in importance and complexity, new agencies were added to the city government until it became a cumbersome, expensive, and ineffective machine. A long list of elective officers made boss control essential, and the ward system of electing councilmen made ward politicians a part of the machine, while sufficient spoils in the way of contracts and appointments made city bossism a profitable and interesting diversion. The voter became discouraged, felt that he was being humbugged, and was lost in the maze of political machinery.

The commission form, with the legislative, executive, and administrative power vested in one body, was adopted after 1900. The failure to separate policy-forming activities from the work of administration is the weakness of this type of city government. They are two distinct functions and must be dealt with as such.

The council-manager plan has been adopted by 365 cities, including several of considerable size such as Cleveland, Cincinnati, Kansas City, and Rochester. This plan provides for a clear-cut separation of legislation and administration. The numbers of the legislative branch are elected by popular vote and in some places by the Hare system of proportional representation. The administrative activities are placed in the hands of a city-manager, who is chosen by the council and serves without term. By this means opportunity is given to secure an efficient administrator who without fear of political domination may operate the city government for the benefit of the citizens. The results of the council-manager plan have been good, and few cities after adopting it have returned to either the mayor-council or the commission form. Its success lies in its correct principles, the election of a representative body, and the appointment of all administrative officers.

106. THE HISTORICAL DEVELOPMENT OF THE MAYORALTY[1]

By Russell M. Story

The development of the mayoral office to its position of responsible leadership is largely the fruit of the last half century. "The mayor system," "mayor government," and like expressions by which we characterize the predominance of the executive in the majority of American municipalities, represent comparatively recent efforts to describe the result produced by the evolution of organization in cities operating under the "federal" principles. This result was so nearly achieved in 1900 that it had called forth general recognition and no little treatment. Moreover, with few exceptions, it was a result that was accepted in large measure in all parts of the Union. It had no serious rival systems with which to contend. True the council was still powerful in many cities. In states like Illinois, the general municipal law did not admit the supremacy of the executive in municipal affairs, but in practice he was very much more powerful than the legislative acts alone would indicate. The place of the office in the municipal régime appeared secure and in many places complete, Its supremacy was now rooted deeply in the past, and there were advocates, not a few, who urged continued exaltation of the office as the most promising hope for good city government in the United States. The hopes of reformers were centered upon it and the enlargement of its influence and power. The judicial functions of the office alone had declined in importance, except in some parts of the south and in Indiana.

Everywhere, practically, the mayor's power to mold the rest of the administrative service, so far as it was under the control of the local government, was recognized, tho to a much greater degree in some cities than in others. Sometimes his powers of appointment and removal were complete, but the practice was more general of requiring the consent of the council, or of one house thereof, to appointments, and often removals by the mayor might be overruled by the council. The tendency was strongly in the direction of making the authority of the mayor independent of any interference on the part of the council in administrative appointments and removals. In cities where this authority was already complete a statement of reasons or a report to the council of the grounds for the exercise of

[1] Reprinted from the University of Illinois, *Studies in the Social Sciences*, 1918, by permission of the author and the publisher.

the power to remove officials was sometimes provided as the sole check upon arbitrary action. Mr. Greenlaw concluded in 1899 that in no other point were the city charters so generally in agreement as in the dependence of administrative officers upon the mayor.

The relation of the mayor to municipal legislation was expressed in an almost universal recognition of the veto power in its qualified form and in a wide acceptance of the selective veto. The veto, indeed, was in the process of a vigorous and healthy development and was being strengthened in matters of finance, including appropriations and indebtedness, and franchise grants. The mayor sat in the council as presiding officer, and he was usually clothed with authority to cast the deciding vote in case of a tie and at times in other matters. In Chicago the mayor had wrested from the council the acknowledged right to appoint the committees of the latter, a victory for the executive that was won by Carter H. Harrison, Sr., as a result of a hard struggle. In New York City the influence of the mayor did not cease when his term of office was ended, but he was given a seat and voice, tho no vote, in the council meetings as long as he was a resident of the city.

Only a few years more were required before the application of the federal principles brot forth the plan of municipal organization, in which the mayor became the prototype within the municipality of the president in our national government with the administrative service grouped into great departments headed by his appointees. In municipal charters and general laws the mayor was made responsible for the government of the city, for the honesty, efficiency, and economy of administration, the character of its laws and the good order, peace, and safety of the community. The attempt to find pure city government and successful administration by the concentration of great powers and even greater responsibility in the person of one man, in the opinion of Mr. Greenlaw, was "almost pathetic." "There is," says Mr. Brand Whitlock, the ex-mayor of Toledo, Ohio, "a strange, almost inexplicable belief in the almost supernatural powers of a Mayor." Says Mr. Whitlock, "I have been waited on by committees—of aged men—demanding that I stop at once those lovers who sought the public parks on moonlit nights in June, I have been roused from bed at two o'clock in the morning with a demand that a team of horses in a barn four miles on the other side of town be fed; innumerable ladies have appealed to me to compel their husbands to show them more affectionate attention, others have asked me to prohibit their neighbors from talking about them. One Jewish resident was so devout that he emigrated to Jerusalem, and his family insisted that I recall him; a Christian

missionary asked me to detail policemen to assist him in converting the Jews to his creed; and pathetic mothers were ever imploring me to order the release of their sons and husbands from prisons and penitentiaries, over which I had no possible jurisdiction." To one sorrowful suppliant the mayor was "the father of all." Moreover, "this exaggerated notion of the mayoral power was not confined to those citizens of the foreign quarters; it was shared by many of the native Americans, who held the mayor responsible for all the vices of the community."

Mr. Whitlock wrote, of course, a decade or more later than Mr. Greenlaw and others who were describing the mayor system of the close of the nineteenth century, yet his words fairly describe the popular opinion of the degree of responsibility which had been heaped upon the municipal executive during the closing years of that period, and indicate how impossible it was for the mayor to approximate in performance the conceptions more or less generally held regarding his position, powers, and functions. Nor did the more intelligent escape this conception of the mayoralty. The "Conferences for Good City Government" gave large space on their programs and in their published "Proceedings" to rehearsals of the campaigns for the mayoralty in various cities; the progress forward or backward was to no small degree measured by the success of reform or independent mayors: the mayor was to make up for the sins of the past, he was the prophet whose coming was the promise of better things, and as executive he appeared the sole hope and refuge of a people who despaired of attaining good city government. The mayor was to be the savior of a municipal citizenship that had not yet perceived that its only salvation could come thru its own exertions, that in truth was almost convinced of its own incapacity for self-help. The measure of responsibility heaped upon the mayor had far surpassed the means at his command for meeting the multitudinous demands and obligations that pressed upon him. Indeed, the means for meeting the responsibilities placed upon him were not fully bestowed upon the mayor, even when the measure of his authority appeared to be the greatest.

By the close of the century the federal principles of government as conceived and worked out in the American national government had wrought an almost complete change in the organization of American cities. Some things yet remained to be done if a true copy of the federal system was to be realized in municipal government, but, barring a revolutionary upheaval in thinking and in tendencies, the complete application and acceptance of these principles did not appear to be far distant. Moreover, most men were hoping that this

time might come speedily. Only here and there arose rare and scattered voices of protest and pleas for the revival and restoration of council government. The tide toward mayor government and the exaltation of the executive seemed to be sweeping ahead irresistibly. The mayoralty seemed destined to become the center of that centralization in our municipal democracies toward which De Tocqueville asserted all democratic governments were tending.

How altered is the situation today! At the very moment of its triumph the mayor plan was successfully challenged. Now nearly a half thousand vigorous and aggressive municipalities enthusiastically proclaim that they have found something better, and in these the mayor is either largely shorn of his power, or dispensed with altogether. Every year adds some scores to the number of cities which relegate to the past the federal analogy as developed in the field of municipal government. To take its place the commission plan and the city manager plan have appeared. They have not won recognition without a struggle, but they have won it. The old order is changing rapidly.

Nevertheless the mayor plan will not disappear. In the course of the contest for public favor it is being stimulated and purified. Many of the more important achievements of the past fifteen years stand to the credit of cities governed under a mayoral régime. In these accomplishments the leadership of the mayors has been conspicuous. Education in local problems has very often been the product of a mayor's leadership and vision. The organization of mayors' associations in many states testifies to a desire and determination to furnish constituencies with intelligent political leadership. The most active members of state and national organizations for municipal betterment are frequently mayors of cities. The mayoralty has undoubtedly held its own in the great cities of the country, and the total number of cities under mayor government is probably not very many less than it was at the beginning of the century. Moreover, it must not be forgotten that there has been a continued development of the power and position of the mayor, and that its predominance in the system based upon the federal analogy is more firmly established than ever before. The desire to supplement popular control and clearly defined responsibility with efficiency has caused the further strengthening of the executive, and the success of rival schemes of municipal organization has hastened and accentuated this development.

Despite this apparent position and continued growth of the mayoralty, it must be observed that it is no longer the most striking feature of municipal life and organization. Tho by no means inconspicu-

ous, recent surveys of municipal tendencies have often omitted to mention it, an oversight which would have been inconceivable little more than a decade ago. It is more difficult to watch a three-ringed performance and the tendency is to watch most intently the latest development. It is true, too, that having set up an organ of government that was both powerful and responsible the attention of reformers was turned toward other problems of municipal life and government, especially that of securing efficiency in the public service. To the solution of this problem both the commission and the city manager plans have rendered signal help. These plans have been the offspring of the movement for efficiency. The evolution of mayor government gradually prepared the electorate for that concentration of authority which efficient administration demands. The splendid successes of the newer forms of government have not sprung full-grown from the fertile womb of disaster; they are rather the product of earlier struggles, the end of which was the reconciliation of democracy and efficiency in American city government. It now appears that mayor government, commission government, and city manager government are to participate in achieving that end. For today each of these forms is potentially and actively full of promise that the end will be realized. The municipal citizen who is still in the prime of life has a reasonable expectancy of living to see good government become the normal thing in American cities, whether their executives are mayors, mayor-commissioners, or city managers.

107. OUR CITY COUNCILS

NEW YORK—THE ECLIPSE OF THE ALDERMEN [1]

By Joseph McGoldrick

Until the advent of home rule, New York city was among the unicameral mayor-and-council governed cities. The Charter of 1901, under which the city is still operating, abolished the old bicameral municipal assembly by doing away with the council and entrusting the city's legislative power solely to the board of aldermen which had existed as a lower house for more than half a century.

A UNICAMERAL COUNCIL

Though the charter provides that all legislative power of the city shall be vested in the board of aldermen, no discussion of New York

[1] Reprinted from the *National Municipal Review,* June, 1925, by permission of the editor.

city's legislative equipment would be complete that did not devote at least half its attention to the board of estimate and apportionment, which is indeed the most important and powerful body connected with the city's government. This board has been called the busiest legislative body in the world, which would perhaps be true, if it were a legislative body. The importance and scope of its powers, the multitude of matters and the sums involved far overshadow the work of the board of aldermen in importance and interest to the taxpayers. Strictly speaking, however, the board is not a legislative but an administrative body. In many matters both the board of aldermen and the board of estimate must co-operate, but even in these cases their action is complementary rather than joint. For example, the board of estimate prepares and presents the budget but it is enacted by the board of aldermen and it must be noted that the latter board may reduce but not increase items, but if within twenty days this board has not taken final action the budget "shall be deemed to be finally adopted as presented by the board of estimate and apportionment." Moreover, the resolutions of the board of estimate are not subject to the veto of the mayor who is himself the chairman of the body.

THE NEW MUNICIPAL ASSEMBLY

Out of these two bodies the home rule enabling act passed by the legislature in 1924 created a local bicameral legislative body (under the revived name, municipal assembly) to exercise the city's newly granted power to pass local laws. The two boards are in every legal respect equal and co-operate as branches of the municipal assembly. This new body and its work during New York's first year of home rule will not be treated in this article. The present article deals only with the two bodies in their original and distinct capacities, which they retain unimpaired and unmodified by their newly acquired functions.

I. THE BOARD OF ESTIMATE AND APPORTIONMENT

To repeat then, the board of estimate and apportionment is not, strictly, a legislative body. It has been aptly described as the board of directors of the municipal corporation of New York. With the exception of the management of the city's real and personal property which is intrusted to the commissioners of the sinking fund, all of the *business* of the city is subject to control or supervision by the board of estimate. The history of the board is reflected in its title, which becomes clearer when we consider the way in which the board

originated. The present board is a descendant of several pre-existing budgetary bodies which extend back at least to the time of the Civil War when a board existed to estimate the expenses of the metropolitan police district, which included the then independent cities of New York and Brooklyn.

COMPOSITION OF THE BOARD

The board of estimate today is composed of the mayor, comptroller, president of the board of aldermen and the five borough presidents. The terms of all members are four years and the election of all takes place at one time. Membership in the board being *ex officio,* the members receive the salaries attached to their individual offices. The mayor and comptroller receive $25,000 a year each; the president of the board of aldermen and the borough presidents each receive $15,000, though their responsibilities are scarcely equal. The members do not, however, have equal voting power. The mayor, comptroller and president of the board of aldermen, the three members elected by the entire city, have three votes each. The borough presidents of Manhattan and Brooklyn have two each and the others one each, making a total of sixteen. All action of the board is taken by resolution adopted by a majority of the whole number of votes. All the members except the mayor and the president of the board of aldermen may be represented at the meeting by their chief subordinates and they frequently are. . . .

EXPANSION OF BOARD'S POWERS

The original power of the board and the one from which it derives its name is, of course, the preparation of the budget, to which reference has already been made. Its close contact with this work from the receipt of the departmental estimates in August until the submission of the final budget to the aldermen in November would alone give it a prime place in the government of a city which spends $400,000,000 annually. But in 1901 its powers were further enlarged when the board of public improvements was abolished. This board had consisted of all the officers who were members of the board of estimate and in addition the six commissioners in charge of water supply, highways, street cleaning, sewers, public buildings and bridges. This system had given rise to much suspicion of graft and corruption. It is even said that enterprising politicians took the paving blocks up off the streets and sold them. At any rate, the supervision of highways, sewers and public buildings was decentral-

ized and placed in the hands of the borough presidents and control over all these matters was transferred to the board of estimate. Three years later, in 1905, the control of franchises was added to the jurisdiction of the board. The shadow of this power still resides in the aldermen, but the board of estimate now has power to amend, revise or repeal any franchise granted by the aldermen and it has sole jurisdiction over franchises for the use of streets for purposes of transit or communication. The franchises are granted in the form of a standard contract for a limited term setting forth maximum rates, penalties and security and providing for subsequent renewals after revaluation and reversion to the city without cost, on the termination of the grant, of all fixed assets in the streets. During the last ten years the board has also had charge of the city's zoning regulations. In 1920 when the city employees' retirement system was created, the board of estimate was made trustee with important discretionary powers.

THE SECRETARIAT

Perhaps the most distinctive feature of the board of estimate is the secretarial staff with which it is provided. This organization alone has a budget of $767,000. Of this $600,972 goes to pay the salaries of its staff of 172 members. Besides clerks and stenographers these include title examiners and statisticians and an engineering department of 47 persons. The chief engineer's staff not only acts in an advisory capacity but was recently planning to undertake the actual construction of the Staten Island tunnel under New York Bay.

All of the matters which come before the board are referred to a particular division or bureau of the secretariat for report and recommendation. The very divisions of the secretariat indicate the nature and scope of the work of the board. The most distinctive are the division of franchises, the bureau of contract supervision, the bureau of personnel, the pension division, the bureau of education, and others including, of course, a bureau of records and minutes.

PROCEDURE

The meetings of the board, held every Friday, are well attended, not merely by the curious but by people affected by the proposals under consideration. There are usually several hundred people present and at times five or six hundred crowd into the chamber. When an important matter of interest to some locality or group is up for passage large

delegations equipped with badges and banners descend upon City Hall. Those who attend are furnished with copies of the calendar, a document of frequently more than a hundred pages, comprising three or four hundred items. Many of these items require public hearings which occasionally lead to heated discussions between members and spokesmen of the public. The taxpayers who want improvements or who object to them because they do not feel they can afford the assessment for them furnish the most numerous group of auditors. Still others come with petitions for transit facilities, or want the zoning regulations changed, or retained, in relation to their neighborhoods. Department heads come with requests for corporate stock for improvements or special revenue bonds for emergencies, or budget transfers, which this board alone is authorized to make. Even the salaries and grades in their offices are established by this board. And the city employee when he reaches the compulsory retirement age of seventy makes application here for permission to remain a while longer.

In some of these matters action by this body is not enough. They must receive the attention of the board of aldermen, the theoretical repository of the city's legislative power, to which we turn next. But from what has already been said it must be apparent that there really can be only a limited field for the energies of this latter body.

II. THE BOARD OF ALDERMEN

As has been indicated the board of aldermen is not what it used to be. It is a far cry to those bountiful days in the time of Tweed when its membership was known as "The Forty Thieves." Not only has it lost in notoriety, but two generations of charter making have cost it much of its former power and prestige. The board has suffered in almost every respect except, as to the number and salaries of its members.

MEMBERSHIP

The board consists of 65 aldermen, elected for two-year terms, from single-member districts, at salaries of $5000 per year. The five borough presidents are also members and rarely appearing themselves, are generally represented by deputies, most frequently their commissioners of public works. The heads of the city departments may also attend the sessions without a vote; indeed they may be required to attend if the board so desires. In practise the heads of the

mayor's important departments attend very infrequently. The mayor does, however, still exercise his right to initiate ordinances.

POWERS OF BOARD SLIGHT

The aldermen meet regularly, except during summer months, at one thirty on Tuesday afternoons. The meetings rarely last more than two hours. The members are quite regular and tolerably prompt in their attendance. This, plus perhaps another afternoon devoted to committee service and infrequent meetings of local improvement boards, is all that is required of the members. Not all find time even for this.

Most of the powers possessed by the typical city council are not within the province of the aldermen. It will be noted that control over franchises, public improvements and street development are not even shared with this board; while in only a few restricted cases is its approval necessary for the selection of sites for public buildings.

The more important powers of the board of aldermen are financial, and of these the most important ones are shared with the board of estimate. They include approval of the city budget, the authorization of the tax levy, the issuance of *corporate stock* for a few particular purposes and the emergency fund of *special revenue* bonds, and the establishment of grades and compensation of positions. With the unanimous consent of the board of estimate it may release contractors from liquidated damages. Independently, the board has power to authorize purchases without public letting for amounts in excess of $1000.

ORDINANCE POWERS

Besides these financial powers, the board has a number of minor powers of considerably less significance, which may be dismissed with the briefest mention. It names and renames streets (Hylan Boulevard, Riegelman Boardwalk and Ruppert Place being recent examples). It establishes street markets; grants permits to societies for small arms practice; authorizes churches to build vaults without fee; authorizes advertising displays and parades; and grants other permits for the use of streets. Many of these matters have been gathered together in the code of ordinance which was revised in 1916. This covers building, the use of streets, sanitation, electrical wiring, public markets, and a host of minor matters. Recent boards have been content to leave the code alone, making upon the average

no more that ten changes per year, these being matters of the merest detail. The charter of 1901 also contained a conditional repeal of some forty-seven sections, provided the board of aldermen covered the subjects by ordinances, but only three such substitutions have been made.

This description would give one indeed a meager and incorrect idea of the board and its functions. The less important powers have become matters of almost individual prerogative, a sort of aldermanic courtesy having grown up, which permits any alderman to secure these blessings for his district without interference on the part of his colleagues. The more important financial powers have almost atrophied.

BUDGET AND TAX LEVY

The most important subject over which the board has jurisdiction is the budget. It may reduce or strike out items but cannot increase them. By the charter 20 days for the discussion of the budget are allowed, with elaborate provisions for its acceptance without the assent of the board at the expiration of this period, but the board actually passes a $400,000,000 budget in twenty minutes. This situation is not wholly the fault of the aldermen. The actual preparation of the budget takes place during the summer months when they are not in session. It is true the departmental estimates are submitted to them in August but by the time they resume deliberations in the fall, the budget is in too crystallized a stage for any criticism to be effective.

Its power to fix the tax rate has degenerated into one of uncritical assent. The comptroller's office not only prepares the information on assessed valuations and the amount required to meet the city budget and the state tax, but it actually prepares the report of the finance committee of the board of aldermen, the members of the committee receiving printed copies less than half an hour before they are expected to sign it.

CONTACT WITH CITY ADMINISTRATIVE OFFICIALS

The nature of its work does, however, throw the board into important relationship with the administrative officers of the city. Each of the mayor's twenty-one departments, every county or borough officer, the officials of the courts, indeed every bureau, board or commission receiving money from the city treasury has more or less frequent contact with the board of aldermen. They must each

receive permission from the board to have petty cash funds for contingent expenses. Furthermore the titles and salaries of all positions in their departments must be fixed by this board. Besides this the departments must have a public letting on all expenditures in excess of $1000 or secure the board's permission to dispense with this requirement, whether they are the purchasing of a $1300 Reo speed wagon, or coal or gasoline to the amount of $20,000 or $50,000.

In this and other respects the department heads are dependent upon aldermanic favor and this tends to bring them and the aldermen together, with results that must frequently be detrimental to the independence of both. There is at least the temptation to throw their offices open to aldermanic influence. While this situation is far from producing the spoils system, it fits nicely into such a system. The aldermen have much leisure and this system may, from time to time, facilitate the endeavors of that well-known provider for idle hands.

THE FUNCTION OF AN ALDERMAN

The board is thus virtually devoid of genuine power and constructive influence in the city government. Few of the matters which come before it are of an important popular character. Few involve policies that are either far-reaching or capable of popular solution. The result is that the work of the board is not interesting even to its members and almost unknown to their constituents. It is doubtful if one ordinary citizen in fifty even knows the name of his alderman, much less what he is engaged in doing at City Hall. If they do have any business with their alderman it is rarely concerning legislative matters, but varies all the way from thoroughly legitimate political guidance to questionable "pull" with other branches of the city government.

THE ALDERMAN, THEMSELVES

The personnel of the board may be imagined from the situation that has been described. In a general sense the membership is representative. The law does not but custom does require each alderman to live in the district which he represents and each alderman is in a measure typical of his district. The social, racial and religious mosaics of cosmopolitan New York are reproduced in the membership. Eight of the members are foreign-born, three coming from Ireland, two from Germany, and one from Roumania, and the other two unrecorded. There is one negro—a lawyer and a Democrat. It is interesting to note further that of the forty-nine native-born,

thirty-eight were born in New York city. Twenty-nine members had only grammar school education, while fifteen, including the lawyers, have had something equivalent to college training. A score or more, are men of no ability or initiative whatsoever—mere proxies of shrewder politicians. But many are men of native quickness, trained largely, in many cases almost solely, in the not-to-be-despised school of experience. Most are in middle life or beyond, the youngest being thirty, and more than a dozen being over fifty-six. It is interesting to note that there has never been a woman elected to the board and few have been candidates except for the minor parties.

A DESIRABLE BERTH

In experience—or more exactly, length of service—the members present a situation somewhat different from that commonly found in legislative bodies. Thirteen have served for more than five terms, which means ten years of service, and three have been in the board nearly twenty years. The number of new members at the last election was only fourteen in a body of sixty-five. It is also interesting to note that nine served in the state legislature before their election to the board of aldermen. Owing to the minority position at Albany of the dominant New York city party, and the smaller salary of only $1,500, paid for a position that takes one away from the city for a period of three or four months and subjects him to fairly heavy strain and expense, it is scarcely surprising that the state legislature is held in less esteem. To this should be added the local political importance of the position of aldermen, which, of course, no alderman overlooks.

PARTY CONTROL

At the present time the majority of the members, 57 in all, not counting the borough presidents who also vote with them, are Democrats. In only four terms since the establishment of Greater New York in 1899 have the Republicans been in a majority on the board. Their party, now reduced to eight, is too feeble in numbers to be at all effective, and it is doubtful if they even make the most of their small opportunities. On only three of the twenty-nine split ballots during 1924 did the Republicans vote as a unit. Whenever one of their number raises objections to a Democratic measure at least one or two of this colleague are pretty sure to be with the majority. Not that the dominant party, seeking to overbear the opposition, exercises a harsh discipline over its members,—it appears, on the contrary, that

their numbers render discipline unnecessary, measures of no significance whatever becoming party matters at the least word of discussion.

The number of Republican aldermen is, of course, quite below the proportion of the Republican vote in the city. The total vote cast for Republicans in 1923 when the present membership was elected amounted to 332,315 or 33 per cent of the total. The district system has frequently in the last twenty years produced gross misrepresentation. At least four times, the discrepancy between the proportion of the vote cast and the number of seats won has exceeded 20 per cent.

SOCIALISTS ELIMINATED

No Socialists were elected to the present board, though their party polled 74,300 votes or 7.6 per cent of the total. Their party grew in members from 1900 until in 1915 it cast 7 per cent of the total vote of the city, but up to that time it did not succeed in electing an alderman. In 1917, however, the Socialist vote more than doubled and seven Socialists were elected. In 1919 their number was reduced to four, and since 1922 there have been no Socialists on the board. There was, of course, a redistricting of certain sections of the city in 1921. The Socialists, while members of the board, at their own expense maintained a legislative bureau which provided them with information which enabled them to give a full and critical discussion of the work of the board. The Republicans have not followed this practice.

ARE THE ALDERMEN WORTH WHILE?

The procedure of the board is quite free and above criticism. What work is done is done in standing committees of which there are twelve and the reports of these committees are almost invariably accepted.

The majority, if impatient, is generally fair, and the rules permit all the discussion which the members wish to put forth. This is, however, very little. It is probable that more than two-thirds of the members do not, in the course of a year, ever address the body. More than half never even introduce a resolution of ordinance. The greatest deterrent to debate is not the rigor of the rules or the steamroller methods of the majority, but the general lack of information and the contempt with which a talker is greeted.

Such is the board of aldermen. For this indulgence to Democratic

vanity the people are paying $585,000 a year, two-thirds as much as the cost of the highly trained board of estimate secretariat. From one point of view this sum is more than half a million dollars, greater by far than the entire budget of many small cities. From another point of view, it is *one-tenth of one per cent* of New York city's budget or ten cents per capita.

It is customary in concluding a discussion of any governmental institution, to consider its future prospects, but the future of the board of aldermen is already with us. By the home rule act passed last year by the New York state legislature, the aldermen, in addition to the functions thus far described, became the lower house of the New York city municipal assembly. It is in terms of this, therefore, that the future of the board of aldermen must be discussed.

108. AN ANALYSIS OF CLEVELAND'S NEW CHARTER[1]

By Chester C. Maxey

I. HOW THE AMENDMENT WAS FRAMED

On the eighth of November, 1921, the voters of Cleveland approved a proposed amendment to the charter of the city providing for the substitution of the manager plan in combination with proportional representation for the existing mayor-and-council form of government. This was such an unprecedented, in fact revolutionary, departure for a large city that it excited universal interest while the equally remarkable way in which it was drafted and adopted has been almost overlooked. Stated briefly, what the amendment did was to repeal sections 3 to 198 inclusive of the existing charter and to substitute therefor one hundred and eighty-one revised sections comprising practically a new instrument of government; and this sweeping constituent change was brought to pass not by the usual solemn process of formulation by a representative charter-making body followed by a vote of the people, but by means of the initiative as provided in the charter itself. Doubtless this is the first instance in our municipal history of the use of the initiative for the framing and adoption of a measure of such fundamental and comprehensive character, and this fact, taken together with the unusual character of the amendment itself, lends extraordinary interest to the manner in which it was drafted.

[1] Reprinted from the *National Municipal Review*, January, 1923, by permission of the editor.

Dr. Hatton Given Free Hand

The initiative petition, by virtue of which the amendment was placed on the ballot, was sponsored by a committee of citizens known as the Committee of One Hundred. The Committee of One Hundred was representative of various civic organizations and interests favorable to the manager plan, and was descended from a committee appointed some two years earlier by the same organizations and known as the Committee of Fifteen. The officers of the Committee of One Hundred were Peter Witt, chairman, A. R. Hatton, vice-chairman, J. D. Halliday, secretary. Dr. Hatton had been one of the most active members of the Committee of Fifteen and by virtue of his familiarity with the situation and his extensive experience as a draftsman of city charters was the logical person to be selected by the Committee of One Hundred to prepare the proposed amendment. He was given a free hand in the framing of the instrument, and his work was ratified by the Committee of One Hundred without substantial modification. Dr. Hatton was virtually able to rewrite the charter of Cleveland according to his own standards both as to form and content. He did not fail to take advantage of every opportunity to simplify and clarify the language of the original instrument, nor did he hesitate at any emendations which in his judgment would improve the substance of the charter.

II. THE ELECTION, ORGANIZATION AND PROCEDURE OF THE COUNCIL

The one feature of the Cleveland amendment which has commanded universal interest is the provision for the election of the members of the city council by the Hare system of proportional representation. Yet it is doubtful if the real purpose of this innovation is generally understood. Proportional representation was not introduced in the Cleveland amendment as an end to be desired for its own sake merely, but to facilitate the attainment of the paramount object of the amendment, which was to bring about a shift of the political center of gravity from the executive to the legislative branch of the city government. Experience had amply demonstrated that the gravest defect of the prevailing system of government was the inevitable contamination of the executive service of the city by the spoils system and the concomitant evils of personal and partizan politics. This was the chief argument for the manager plan, which is supposed to take the executive service out of politics

by providing for the choice and control of the chief executive by a small commission or council itself elected by the people on a nonpartizan basis. But Cleveland is several times larger than any city that has tried the commission-manager plan, and it was feared that no matter how chosen, a commission or council of five, seven, or nine members would be too small to be fairly representative of the huge and diverse population of the city. And yet with a larger council it would be necessary to revert to the ward system with all of its admitted evils or to employ the method of election at large and contend with the ills incident to the long ballot. Experience, furthermore, supplied convincing proof that neither of these systems would be likely to produce a council that could be entrusted with the responsibility of selecting and controlling the manager. Proportional representation appeared to be the solution of the problem. It would obviate both the long ballot and the ward system, and still it would produce a representative body whose members, according to the contentions of the proportionalists, would be of exceptionally high quality.

The amendment provides for a council of twenty-five members. The city is divided into four districts for the purpose of electing members of the council, and the four districts elect seven, five, six, and seven members respectively by the proportional representation method. This allocation of representation is to remain unchanged until the reapportionment following the next decennial Federal census, unless prior to that time the population of the city shall have been augmented four per cent by the annexation of suburbs. The four districts represent a studied attempt to distribute representation on the basis of social and economic rather than geographical and numerical considerations. The districts are not equal in size or population (hence the inequality of representation in the council), but each is in a broad way a homogeneous social and economic entity. Within each district there are, of course, lesser social and economic groupings, and it is believed that where any of these is of consequence it will be accorded representation through the operation of the Hare system of election. The amendment contains elaborate rules governing the form, marking and counting of the ballots.[2]

Restraints Upon the Council

One might suppose that the confidence of the authors of the amendment that the new scheme of representation and election would

[2] *Revised Hare Rules* published by the American Proportional Representation Society in 1917.

produce a council of superior quality, would have resulted in the abandonment of petty and vexatious restrictions upon councils that customarily abound in municipal charters; but it is a curious fact that the amended charter contains evidence of a deeper distrust of representative bodies than the original instrument. The old charter, for instance, empowers the council to fix the salaries of its own members with the proviso that changes can apply only to the successor of the council making them; but the amendment fixes $1,800 as the councilmaniac salary and deprives the council of authority to modify that figure. Naturally there occurs the query as to whether the framers feared that a council elected by proportional representation would be less trustworthy than the old council, chosen by the ward system. Another case of the same character is the change made in the rule regarding attendance. The provision of the original charter was that unless excused by a two-thirds vote of the council, a member should forfeit two per cent of his annual salary for each absence from a *regular* meeting of the council; but the amendment provides that a member shall forfeit two per cent of his annual salary for each absence from a *regular* or *called* meeting of the council *unless prevented from attending by his own illness.* Does this unreasonable and inflexible rule suggest that the framers of the amendment anticipated that a council chosen by proportional representation would exhibit a higher sense of public duty than councils of the old type? An additional indication of lack of confidence in the results of proportional representation is found in the provision regarding expulsion. Under the old charter a member guilty of misconduct or violation of the rules of the council could be expelled by a two-thirds vote of all of the members elected to the council. The amendment increases the majority required for expulsion to four-fifths of all the members elected to the council, a majority which could hardly be construed to indicate extensive confidence in the council to be elected by proportional representation. In the same way the majority required to declare an ordinance immediately in effect as an emergency ordinance has been increased from two-thirds in the old charter to four-fifths in the amendment, a change which would certainly seem to be symptomatic of a fear that the council under the new order would be likely to abuse the emergency power.

Will the Mayor Become Premier?

The council, as is customary in commission-manager charters, is empowered to choose one of its own members as its president, and

this functionary is endowed with the title of mayor and becomes the titular and ceremonial head of the city government. There is a possibility, in fact, that the mayor may develop into something more than the presiding officer of the council and the official head of the government. If the position should be filled by a succession of persons possessing qualities of leadership and statesmanship, it could quite readily evolve into a sort of premiership devoid of administrative responsibilities. The mayor, then, would be the political head of the government and the leader of the council in all matters involving the determination of policies. This would tend to remove the temptation which has victimized so many managers, viz., to overstep the bounds of administration and assume functions of political leadership. In anticipation of such a development the charter amendment provides for paying the mayor a salary commensurate with the importance of his functions.

The council is also authorized to appoint a clerk and such other officers and employees for its own service as it may deem necessary, all such officers and employees to serve during the pleasure of the council. The provisions having to do with the legislative procedure of the council and the form of ordinances and resolutions are carried over from the old charter without substantial modification, except for the insertion of a section providing for the codification of ordinances.

Budget Modifications

The financial procedure prescribed in the old charter is imported into the amendment with adaptations and emendations designed to improve the operation of the budget system. Except in the case of the earnings of a non-tax-supported public utility the council could under the old charter at any time transfer money from one budget appropriation to another, but the new charter limits this right to unencumbered balances of appropriations. The old charter provided that *unexpended* balances of appropriations should revert to the respective funds from which they were appropriated; the amendment modifies this by prescribing that only *unencumbered* balances shall so revert, a very important change from the standpoint of budget control. Another instance of the attempt to tighten up financial procedure is the insertion of the requirement (Section 69), which did not appear in the former charter, that appropriations accounts shall be kept for each item of appropriation made by the council, every warrant on the treasury to show specifically against which appropriation item it is drawn, and each account to show in detail the appropriation made

by the council, the amount drawn thereon, the unpaid obligations charged against the item, and the unencumbered balance remaining.

III. THE CITY MANAGER AND THE ADMINISTRATIVE SERVICE

The council is obliged to appoint a city manager who shall be the chief executive officer of the city. It is specified that the city manager shall be appointed solely on the basis of his executive and administrative qualifications and need not when appointed be a resident of Cleveland or the state of Ohio. He is to be appointed for an indefinite term, but to be removable at any time at the pleasure of the council. It is provided, however, that if he is removed at any time after he has served six months, he may demand that written charges be filed against him and shall be entitled to a public hearing at a meeting of the council prior to the time when his final removal shall take place. Both the wisdom and efficacy of this provision are open to question. If a council, fearing the publicity involved in written charges and a public hearing, is determined nevertheless to reduce the manager to a position of political subserviency to it, it will find it possible to club the manager into line or remove him during the first six months. Moreover, written charges and a public hearing can be of very little protection to the manager unless they constitute a limitation upon the council's power to remove, which is a result that the amendment disclaims as unintended. A council determined upon the removal of a manager on purely political grounds would have no difficulty in framing charges of such plausibility and conducting the hearing in such a manner that a manager solicitous of his professional reputation would prefer quietly to resign. Furthermore the council controls the compensation of the city manager, and may reduce his salary at will or abolish it entirely without any public explanation. Obviously this furnishes an indirect way of forcing the resignation of the manager without the necessity of written charges and a public hearing.

Council Forbidden from Administrative Meddling

The council is forbidden to appoint one of its own members as city manager, which in the light of experience would seem to be a prudent restriction. It is likewise declared that neither the council nor any of its committees of members shall dictate or attempt to dictate or influence in any way the appointment or removal of persons in the administrative service under the city manager. And it is further declared that with the exception of conducting inquiries, the

council shall deal with the administrative service of the city only through the city manager, and that neither the council nor any of its members shall give orders to any subordinate of the city manager either publicly or privately.

The city manager is declared to be the head of the administrative service of the city and is responsible to the council for the administration of all affairs placed under his charge. He is given power to appoint the directors of all departments and all officers and members of commissions not included in the regular departments unless the charter specifically provides otherwise. The injunction is laid down that:

> Appointments made by the city manager shall be on the basis of executive and administrative ability and of the training and experience of such appointees for the work they are to administer.

Manifestly this is mere counsel of perfection and of no legal force whatever. All officers appointed by the manager are immediately responsible to him and may be removed by him at any time; but in case of removal by the city manager, the person removed is entitled to have written charges filed against him by the city manager and to have a public hearing before the city manager before the removal can be made final. From the standpoint of sound administrative organization this restriction upon the manager's removing power seems viciously obstructive; for the persons protected against summary removal by the manager are not the great mass of officials and employees whose tenure will be protected by the civil service provisions of the charter, but the heads of departments and other highly placed officials who will virtually constitute the manager's cabinet and consequently should be removable by him on such a purely capricious ground as personal incompatibility.

The duties of the city manager are broadly outlined in Section 35 as follows:

> To act as chief conservator of the peace within the city; to supervise the administration of the affairs of the city; to see that the ordinances of the city and the laws of the state are enforced; to make such recommendations to the council concerning the affairs of the city as may seem to him desirable; to keep the council advised of the financial condition and future needs of the city; to prepare and submit to the council the annual budget estimate; to prepare and submit to the council such reports as may be required by that body; and to perform such other duties as may be prescribed by this charter or be required of him by ordinance or resolution of the council.

It is provided that the city manager, the directors of departments, and any other officers designated by vote of the council, shall be entitled to seats in the council, but without power to vote. The manager is to have the right to participate in the discussion of all matters coming before the council, but the directors and other officers are confined to matters pertaining to their respective departments and offices. Power to investigate the conduct of any department or office of the city, reinforced by power to subpœna witnesses, administer oaths. and compel the production of books, papers, and other evidence, is conferred upon the council, the city manager, or any person or committee authorized by either of them. The purpose of conferring this power upon the council is obvious, but in case of the manager, who has direct administrative authority over the executive service of the city, it would seem superfluous, unless it was intended to give the manager the power to explore the conduct of the offices under the council, such as mayor and clerk, which, if attempted, would lead to highly amusing complications.

Broad Power to Determine Administrative Organization

Three departments—law, finance, and public utilities—are created by the charter amendment, and the council is empowered to establish additional departments and offices at will. The council is also given power to revise and reorganize the administrative machinery of the city as it deems expedient, subject to the limitation that no function assigned by the charter to a particular department or office shall be abolished or assigned to another department or office and that no department shall be created or abolished until the recommendations of the city manager have been heard by the council. The functions of the three departments set up by the charter amendment are laid down with considerable explicitness and detail. The head of each department is appointed by the city manager and given the title of director. The work of each department is distributed among divisions, established by the charter or by the council, and at the head of each division is an officer known as the commissioner, who is appointed by the director acting in conformity with the civil service provisions of the charter. Each commissioner, with the approval and under the supervision of the director, appoints the officers and employees of his division and administers its affairs.

The provisions of the old charter pertaining to the organization and control of the police and fire departments are carried over by the amendment with only such modifications as are necessary to adapt them to the new administrative set-up, the duality of command which

has caused so many difficulties under the old charter being explicitly preserved. In rewriting the civil service provisions of the old charter care was taken not only to make the necessary adaptations to the new organization, but also to inject many provisions designed to safeguard and improve the operation of the merit system. A few examples will be given. The past history of civil service in Cleveland readily explains why the mandate was laid upon the council to appropriate each year a sum sufficient to carry out the civil service provisions of the charter, although the legal efficacy of the provision is open to question. The limitation upon transfers to a position subject to competitive tests from one not subject to competitive tests (sec. 96) is manifestly a wise precaution to protect the merit principle. Of the same character is section 98 which requires that the eligible lists and the grades of candidates shall be open to public inspection, and that any person appointed from an eligible list and laid off for lack of work or appropriation shall be placed at the head of such eligible list and be eligible for re-appointment for the period of eligibility provided by the rules of the commission. The striking increase of the penalty for violation of the civil service provisions of the charter or the rules of the commission from a fine varying from $10 to $100 or imprisonment for not more than ten days, or both, to a fine varying from $50 to $1,000 or imprisonment not exceeding six months, or both, also indicates a determination to put teeth into the civil service laws. The provision (sec. 100) which directs the civil service commission to fix and enforce standards of efficiency and devise measures for coördinating the work of the various departments was doubtless introduced in order to pave the way for scientific personnel management in the city administration.

IV. CONCLUSIONS

Criticism of the details of the amended charter should not be allowed to obscure the fact that it is altogether the most courageous experiment in political reconstruction that is being undertaken in America today, and perfection of detail is not indispensable to its ultimate success. In the mind of the average citizen of Cleveland it probably represents simply a step in the direction of greater efficiency and economy, but it is far more than that. It not only marks the definite abandonment of the venerable principle of separation of powers in municipal government and the ordination of an entirely new relation between the legislative and executive organs of government, but it also marks the advent of a new principle of representation which is likely to produce a legislative body of a composition wholly

unlike anything previously known to American experience. It is an edifice of new design, erected upon new foundations, and we have yet to see how it will resist the stress and strain of the elements.

109. HOW P. R. WORKED IN CLEVELAND[1]

The first test of P. R. in a great American city came in 1923 when the council of Cleveland was elected by P. R. for the first time. Cleveland is the fifth city of the United States, with about 800,000 inhabitants. It has great commercial and manufacturing interests and a large industrial population drawn from practically every race and country in the world. Under such circumstances P. R. justified at once all the claims made for it by its careful advocates. There is no longer any excuse for referring to P. R. as an untried experiment in large-scale elections under American conditions.

A DIGNIFIED CAMPAIGN

It is of course true that more elections will be needed to bring out the full value of Cleveland's new method of election, but some of its beneficial effects were in marked evidence even before the first election took place. Among these was the candidacy of several persons of outstanding ability and qualifications for office who would not have been willing to make the political arrangements considered necessary for success under the old ward system.[2]

Old residents of Cleveland testified that the first P. R. election was less like a circus and more like the serious business of choosing a governing body for a great city than any previous campaign they had known. Mudslinging and personal abuse were no longer in fashion. The candidate realized that his task was no longer to discredit a particular rival in a single-member district but to persuade a sufficient group of voters in a large district to choose him as their spokesman. The outstanding leaders of all elements and points of view were sure to be elected in any case and it was not good policy to alienate the friends of weaker rivals who might give him a second

[1] Reprinted from the *Proportional Representation Review,* July, 1925, by permission of the publisher.

[2] Much has been made of the fact that the first trial of P. R. brought into the field as many new candidates who were ill-qualified as it did new candidates of merit. This fact appears to us of no particular consequence. The ill-qualified candidates were clearly shown by the election that P. R. offers no prospects to the person who merely "takes a chance" without the confidence of a substantial number of voters, whereas some of the new candidates of outstanding ability were elected.

or later choice. Republicans, Democrats, and independents spoke night after night from the same platform under the auspices of the Citizens League, usually with every evidence of courtesy and good feeling. William M. Tugman, special political writer for the Cleveland *Plain Dealer,* wrote three weeks before the election: "It is a strange campaign, the strangest Cleveland ever has seen. The great god Ballyhoo, the patron of party strategists in all other campaigns, is dead, the victim of P. R."

A FREE CHOICE

Candidates soon realized that more than ever before they must stand or fall on their own merits. In the old contests for a majority [3] in a single-member ward the backing of the dominant party organization was usually sufficient to carry a candidate through. But with P. R. the independent voters could disregard party lines without fear of wasting their votes and the party voters could choose freely among the candidates of the party. The party organizations waited until after all the nomination petitions had been filed and then endorsed not only their old standbys but every popular candidate whom they could endorse without danger of public repudiation. After the election Mr. Tugman said to the politicians in his weekly humorous column "The Statesman's Window": "If Hatton and Witt and Miss Wing and Kennedy [the independents elected] had been amenable to reason, you might have made one hundred per cent on pickin' the winners, even under the new system." Both parties endorsed in every district more candidates than they could reasonably hope to elect and in most cases left the choice of candidates among them entirely to the voter's discretion. Thus even a candidate elected by party votes was sure to be the choice not primarily of the party organization but of the party voters.

INDEPENDENTS ELECTED

The outstanding result of the election was a demonstration that even in a city which had long been dominated by party politicians outstanding independents could under P. R. secure election. In

[3] Before the introduction of P. R. Cleveland used the Bucklin system of majority preferential voting. Under this defective system only a very small proportion of the voters used their second and later choices, because to do so might have helped defeat their first choices. The result was almost invariably the same as that of a plurality election without a primary. In the 1921 election 18 of the 32 successful candidates for council were chosen by a minority vote.

every one of the four districts into which the city was divided the councilmen chosen included Republicans, Democrats, and independents. The previous council had contained no members not affiliated with one or the other of the major parties and but few with independent leanings.

Perhaps the most striking case was the election of Miss Marie Wing, Secretary of the Ohio Consumers League, in the third district. Though running in the most machine-ridden part of the city Miss Wing polled a vote greater than any which had elected a councilman two years before with two exceptions and was clearly entitled to the place on the council which P. R. gave her. Previously the voters who elected her had been without a voice in the city's affairs because their votes had been scattered over several wards. The other five members elected from Miss Wing's district were the Republican floor leader, Herman H. Finkle; a colored Republican member of the old council, another Republican councilman, a Democratic councilman recognized as the spokesman for certain business interests, and a Democratic councilman affiliated with organized labor.

REPRESENTATION FOR ALL

Eighty-one per cent of those who cast valid ballots helped elect candidates for whom they had voted, as compared with forty-six per cent under the ward system two years before, and many of the ballots not technically effective had been marked for candidates elected by others. Although, apparently through no fault of the method of election,[4] the valid vote was nearly 25,000 less than in the election of councilmen two years before, the effective vote was more than 25,000 greater. The variety of representation secured was such that it would probably be difficult to find anyone in Cleveland who was not satisfied with at least part of the first P. R. council.

PARTY LINES DISREGARDED

Classified by parties the new council included fifteen Republicans, six Democrats, and four independents. An examination of the result sheets shows, however, that a large part of the voters disregarded party lines. Racial and religious lines also, though as in past elections they had some effect, were largely disregarded. More ballots were transferred from Democrats to Republicans than from

[4] The Cleveland vote, like that of many other American cities, had been steadily declining for some years. The decrease was less between 1922 and the P. R. election of 1923 than between 1921 and 1922, when a governor, United States Senator, Congressmen, and state legislators were being chosen.

Democrats to Democrats, and many more from independents to Republicans than from independents to other independents. In fact, it can be demonstrated that the Republican organization owes its majority to its sagacity in endorsing candidates who would appeal to independent voters. If the party line-up shown by first choices had been followed by the voters in the expression of their labor choices, the result would have been Republicans eleven, Democrats six, independents eight.

A BETTER COUNCIL

The personnel of the new council is admittedly of larger calibre than that of any of its recent predecessors. Maurice Maschke, leader of the Cleveland Republican organization, said at the close of the election, "I believe the city of Cleveland has elected the best city council in twenty years." In view of the fact that the Republican party had opposed the adoption of P. R. and that its majority was somewhat reduced by it, this statement is significant. The Citizens League of Cleveland, an influential non-partisan organization which endorsed candidates on the basis of character and ability, summed up its judgment of the election in the following statement, signed by its President, Carl D. Friebolin: "The vote has resulted in the best council which the city of Cleveland has had in the last fifteen or twenty years. . . . The council has a clear majority of intelligent and broad-minded men and women, who will, we believe, determine municipal policies on the broad ground of the city's interests rather than party expediency."

Although the council proceeded to organize along partisan lines, it has done much to fulfil this prediction. Committee chairmanships were given to five Democrats and one independent as well as to twelve Republicans, and all the members were given important committee assignments. A healthy rivalry soon developed between independents and party members for the credit of constructive measures. And as time went on an increasing number of important questions were decided without regard to party affiliation. Miss Wing, for example, secured the passage of her resolution for the creation of a woman's police bureau by a non-party vote of thirteen to twelve.

THE P. R. COUNCIL CHOOSES A MANAGER

The first and most important action of the council was the choice of a city manager to replace the former elected mayor as executive head of the city. With one dissenting vote the council chose William

R. Hopkins, one of Cleveland's leading business men, at a salary of $25,000 a year. This choice met with very general approval. Although many disagree with Mr. Hopkins in particular matters of policy, probably most would agree with the estimate given by Miss Belle Sherwin, President of the National League of Women Voters, that he "is better qualified by business experience and technical training to be the executive of a great city than any mayor of Cleveland for the past thirty years with probably one exception." As its political leader, known as mayor under the new charter though relieved of all executive responsibilities, the council chose its former president, Clayton C. Townes, independent Republican, by unanimous vote.

PUBLIC INTEREST AROUSED

It soon became apparent that the new representative council could be counted on to get to the root of all issues in the questions which came before it. Debate was no longer perfunctory but cogent and even picturesque. Attendance at council meetings jumped from an average of less than fifty under the old ward plan to well over five hundred.[5] Professor Chester C. Maxey of the Political Science Department of Western Reserve University summed up the new situation as follows: "Under P. R., in November 1923, there was elected a group of militant independents whose ceaseless opposition and forceful criticisms have almost converted the city council into a deliberative assembly. Never has there been so much real debate on measures before the council, and never has public interest in the work of the council been so great. This has tended to . . . draw the lines of political conflict in such a manner that the public can appreciate the real issues involved in every question."

A RECORD OF ACHIEVEMENT

The new council has been productive not only of interest but of accomplishment. Speaking of a particular council meeting the Cleveland *Press* of February 27, 1924, said editorially: *"The Press* takes off its hat today to the City Council! Monday night's meeting resulted in the biggest grist of thoughtful, constructive, forward-looking municipal business which has been transacted in that chamber in many a long day. The spirit of the new charter is evidently asserting itself. The old tendencies to machine rule and stupid ward politics are giving

[5] This average was maintained until the hot months of the following summer.

way before the intelligent, progressive drives of the independent members. A new willingness to work out plans that are *for the good of the whole community* seems apparent."

Largely as a result of Cleveland's experience, Ohio's second city, Cincinnati, adopted proportional representation with the manager plan on November 4, 1924, by a vote of 92,510 to 41,105.

Beard (4th Ed.), pp. 700–730.
Kimball, *State and Municipal Government,* pp. 409–453.
Ogg and Ray, (2nd Ed.), pp. 841–851; 852–866.

XXVIII

SOCIAL AND ECONOMIC PROBLEMS OF THE CITY

The modern city is a highly developed organism which increases in complexity as the wants of man become more involved. The city of a hundred years ago was a trading center where surplus commodities, grown or manufactured outside of the city, were brought together for sale or exchange. The steam engine, the gas engine, and the electric motor, and their applications to industry, have made the city a manufacturing unit. The factory has replaced the market-place as the center of activity. Within the limits of the city are thousands of individuals who are dependent upon the government for water, heat, light, transportation, food, ice, and recreation. They are helpless without the protection of the city. This dependency requires of the city officials vision, foresight, and careful supervision which must be reflected in good city administration. Health regulations, housing, education, social agencies, parks, play-grounds, etc., assume new importance in the modern city. The budget, modern accounting methods, and centralized purchasing are important, but the social services of the city are vastly greater because with them are bound up the health, happiness, and welfare of the citizens. The growth of the city is determined by the success of the government in solving these problems.

As city government is surveyed in the light of present conditions, these social aspects must receive first consideration.

110. THE MUNICIPAL BUDGET[1]

The budget of a city, village or town presents the financial program for a future fiscal period by listing (1) the authorized activities and services of the government, (2) their respective costs, and (3) the methods of funding or meeting these costs. In one sense it is a picture of the structure and activities of the government painted in terms of dollars and cents. Unfortunately, although necessarily, this picture requires the use of accounting forms which with their formal, unimaginative headings and schedules are not always devised to arouse a penetrating interest in public affairs on the part of the citi-

[1] Reprinted from the *Municipal Budget*, The League of Minnesota Municipalities, Publication No. 1, by permission of the publisher.

zenry. In fact, the present formality and brevity of most budget statements rather tends to make the uninitiated citizen avoid a budget analysis as if it were reserved only for the accountant's understanding.

But budgets, said Gladstone, are not merely affairs of arithmetic. In a thousand ways, he continued, they "go to the root of prosperity of individuals, the relation of classes, and the strength of kingdoms." This conception (it applies in degree to the budget of the small municipality as well as to the budget of a nation) must be realized for the public good. And therein awaits the great duty of the budget maker. He has within his grasp the opportunity to make certain that mechanical accounting technique shall not overshadow and obscure real significance and public purpose. Whether he be mayor, councilman, clerk, or manager, the budget maker should consider himself consecrated to the task of presenting a clear, understandable, and humanly interesting picture, not only for official view, but, far more important, for the view of all intelligent citizens who must know that the prosperity, welfare and safety of their own community depends largely upon the contents of the public budget itself.

THE BUDGET—DEFINITION

The term budget, as commonly used by budget authorities, is a complete financial plan for a definite period, based upon careful estimates both of the expenditure needs and of the probable income of the government. Thus the budget, in its simplest form, involves two series of statements. The first series will show the probable or estimated cost of operating all authorized governmental activities during the definite fiscal period; and the second series will show the probable or estimated revenue or income available for meeting the cost of the proposed expenditures. The sum total of the estimated expenditures should not exceed the sum total of the estimated revenue.

THE PURPOSE OF THE BUDGET

1. Obviously, the balancing of the proposed expenditures to the anticipated income or revenue is the important and fundamental purpose of the budget. This balance, if maintained, makes certain that the municipality shall limit its activities and work program to "keep within its income." This is good business and sound common sense.

2. The budget ordinance authorizes the municipal activities and provides funds to finance them. It should also allot the performance of the activities to the several administrative departments or officials. This fixes responsibility. Municipal officials are not only obligated

to carry out their allotted tasks, but at the same time they are warned to limit their expenditures to the definite amounts appropriated. This assures careful planning, the rendering of accounts, and leads to economy.

3. The budget informs the citizen, as well as the official, concerning the activities of his municipality. It tells him of the source of the public moneys. It tells him where, how, and by whom this money will be spent. This information automatically suggests the structure and operating methods of his government. It thus educates the citizen to an understanding and appreciation of the magnitude and importance of the public tasks. The budget, as an instrument of publicity, is a great social document.

PROCEDURE IN PREPARING THE BUDGET

The procedure in preparing the budget requires several separate steps. These are necessary to assure a thorough review or check of the contents and to make certain that the decisions take into consideration several cross sections of public and official opinion. The following procedure is suggestive:

1. *Requests for appropriations from the heads of the organization unit or spending officers* should be submitted to the budget agency approximately two months prior to the official submission of the budget to the appropriating agency, i. e., the council. These requests should be filled out on prescribed forms furnished by the budget agency. Detailed instruction regarding the forms should also be furnished by the budget agency. These standard forms and instructions assure uniformity and a common budget language in all departments. They should explain in detail the headings and sub-headings in the several classifications, i. e. (1) organization unit, (2) objects, (3) activities. It is assumed that the department head will consult with his subordinates and interested parties before making his budget requests.

2. *The budget requests for expenditures from the organization units may then be assembled for review by the budget agency* (i. e., the officer or council or board or clerk or manager responsible for submitting the budget). The budget agency may then make out statements or schedules of the requests on the forms somewhat similar to the forms heretofore suggested.

3. *To submit statements regarding the revenue side of the budget.* After the estimates for expenditures have been entered and reviewed, the budget agency may ask the finance officers (the comptroller, treasurer, auditor, etc.) These will furnish the information regarding

cash on hand and revenue to be anticipated from the several sources. This is the type of information that will be necessary to fill out the forms on the revenue side of the budget.

4. *Public hearings* should be held before the budget agency makes its final decision as to the contents of the budget. These should be special hearings, devoted entirely to the subject of the budget contents. This allows the taxpayers or interested parties, even non-residents, to appear before the budget agency to support or criticise the contents. These hearings should be solely for the advice of the budget agency.

5. *The proposed budget may then be officially submitted by the budget agency to the appropriation agency* (i. e., the council, board of trustees, or commission). This should be the occasion for a budget statement or speech by some responsible officer who will have an opportunity to inform the council and the public regarding the proposed municipal administrative policy and activities. This speech should be the most important speech of the governmental year.

6. *Action on the proposed budget may be taken by the council after the budget speech or formal presentation.* The items may be taken up singly in a meeting or series of meetings, depending upon the size of the municipality or the special circumstances. This gives the council opportunity to consider the detailed budget proposals and to reject, approve or revise the proposals in accordance with its will and authority. This action requires the regular procedure for passing appropriations and results in the final and official budget or appropriation ordinance.

THE BUDGET OR APPROPRIATION ORDINANCE

The items contained in the appropriation ordinance should be listed under the headings of the organization units so that responsibility for the expenditures may be fixed upon the definite officers who are the heads of the respective departments, commissions, bureaus, etc. Experience has proved that it is not advisable to set up the appropriations in terms of functions and activities because the border line between activities is often too hazy to distinguish. The organization unit is the logical and most satisfactory basis for "setting up" appropriations.

It may not be advisable to have the items as expressed in the budget proposals identical with the items in the appropriation ordinance. The budget proposals, as presented to the council, should be quite detailed so that the whole plan for future governmental activities may be visible. On the other hand the items in the appropriation ordi-

nance, as passed by the council, should not be too numerous or "segregated." It should always be remembered that if the items are too detailed there is danger that administrators may be unnecessarily restricted when honest miscalculations are made or when new and unforeseen projects or activities arise in an emergency.

In budget parlance a highly itemized budget gives rise to excessive "segregation"; and may handicap good administration. On this point Mr. A. E. Buck, in his book on "Budget Making," writes: "Several years ago state legislatures and city councils generally made lump sum appropriations. Then it was found that administrative officers having lump sums of money at their disposal used it for purposes in no way connected with the work they were intended to accomplish. In an attempt to check this abuse the appropriations were highly and rigidly itemized by the legislative body. No money could be drawn from the treasury except in accordance with the details specified in the appropriation act. This put a check on graft, but, at the same time, it bridled the free play of initiative and ingenuity in developing efficient administration. The legislative body had gone too far; it had attempted to determine for each office who should be employed, what salaries should be paid, who should be promoted or demoted, and what kinds and quality of supplies should be used. In other words, it attempted to decide every petty detail of administration from six to eighteen months in advance of the time when decisions should have been made. Under such conditions the use of judgment in the direction and control of the administration was next to impossible. Such success in administration as attained under this rigid system of appropriation was the result largely of either winking at or disregarding altogether the provisions of the appropriation act."

Nevertheless, in spite of this warning, care should be taken that the appropriation ordinance shall not be too flexible, i. e., that the discretion of the administrator shall not be abused. If there is excessive flexibility or in other words too many "lump sums," one of the primary objects of the budget, namely, control over the administrator by expressed limitation of expenditures, may be defeated.

This question of rigidity vs. flexibility, of the segregated budget vs. the lump sum, must be answered by each municipality for itself. There can be no dogmatic proposal applicable to all. A rule of reasonableness should be followed. The answer will be found in the confidence which the council or appropriating agency has in the faith and integrity of the administrative officials. For some departments reasonable flexibility may be desirable; for others, itemization may be wise or expedient to wield the whip hand of restriction. The purpose of the budget as a picture of information should be emphasized

constantly. Extreme flexibility may defeat this end. In any case, the final form of the appropriation ordinance should be followed strictly. No item should be overspent. And each item should be the gauge or standard to guide the auditor in his check upon the spending authorities.

CONTROL

With the passage of the budget or appropriation act the tax levy may be calculated. The budget is then complete. The funds may be set up in the controlling books and the respective accounts opened in each department or organization unit. Budget items should be strictly guarded. The amounts should not be exceeded. Auditing control is needed or otherwise the budget may deteriorate into a scrap of paper. It is incumbent upon all spending officers to so plan their course of action in administering funds that additional revenue will not be required during the fiscal period except for extreme emergencies. Above all things liabilities should not be incurred during the fiscal period and sloughed off into the next fiscal period for payment. Coal, for instance, should not be used during one period and paid for in another period unless definite provision has been made. In other words costs should be logically and fairly distributed to reflect the requirements of the particular fiscal period.

THE TIME OF THE YEAR FOR PREPARING THE BUDGET

The budget period should be timed and coordinated with both the fiscal period (i. e., the period during which the financial books are opened and closed) and the political period (i. e., the period during which the elective officers, mayor, councilmen or trustees, are in office). The following table will illustrate good "timing." Here it is assumed, for example, that the political period begins on April 1st and that the fiscal period begins on July 1st. This is a common experience for many Minnesota municipalities.

April 1st	Political year begins.
April 1st	Budget agency sends forms and instructions (1) to department heads and spending officers, requesting esimates for appropriations during the next fiscal period, and (2) to fiscal officers, requesting estimates of the income that may be available during the next fiscal period, and an estimate of the probable cash on hand June 30th.
April 15th	Estimates or requests from the department heads or spending officers submitted to the budget agency.

May 1st	Budget estimates printed by budget agency and made public.
May 15th	Public hearings on budget estimates.
June 1st	Submission of budget proposals by budget agency to the council for formal action—Budget speech.
June 2–20	Action by council in approving or disapproving budget estimates and in formulating the fiscal and administrative policy ending in the passage of the appropriation or budget ordinance.
July 1st	Fiscal year begins—appropriation accounts entered in the controlling books and debited in the respective departments or organization units.

The above is a good arrangement. If the political year begins at another time than April 1st the schedule can be arranged accordingly with approximately the same intervals of time between steps. It is a good policy to have the fiscal period begin immediately after the budget has been authorized. This requires that the deliberative processes should be finished at the earliest moment consistent with fair hearings and reasonable time for debate. Then the new administration can begin work upon its own policies with a minimum of delay. Care should be taken to assure that the budget period begins soon after the opening of the political year so that the policy of the incoming administration may be formulated at the very outset. The fiscal and the political years should never be identical in time because under these circumstances the incoming officers would be bound and limited by a budget and fiscal policy determined by their predecessors with whom they may be opposed politically.

SUPPLEMENTARY INFORMATION

The preceding forms are sufficient for presenting the necessary elements of a good budget. Subject to modifications to meet the needs of individual instances, they are quite essential. There are other classes of information, however, that are not essential but which, if appended to the official budget, would make the budget picture more complete as a source of public interest and information. Statistics could well be included to show (1) population; (2) assessed valuations of property; (3) tax rate per capita during previous years; (4) debt statement to include out-standing bond issues; purpose for each issue; interest rates; selling price; other indebtedness—outstanding warrants, etc.; (5) building operations; (6) general information regarding number of felonies; number of crimes reported; number of indictments and convictions; number of fires and amount of property losses, etc.; (7) statements describing the plans and policy of

the several municipal departments; (8) balance sheet to show liabilities and assets of the municipal corporation. Information of this character may be included without limit.

SUGGESTIONS FOR BUDGET PROVISIONS IN AN ORDINANCE OR CHARTER

1. Definitions.
2. The fiscal period—timed logically with political period.
3. The contents of the budget—with major headings of the classifications for (a) expenditures (b) income and (c) funds.
4. The specific mention of departments or municipally owned utility enterprises to be included in the budget statements.
5. The establishment of a definite department or office in which the duties of preparing the budget may be centralized. (Adequate provision should be made to assure necessary assistance in the process or preparation.)
6. Budget procedure made definite. (Mention should be made of the several steps to include dates for submitting departmental estimates—public hearings prior to submission of the budget to the council—and procedure in council.)
7. Item shall not be exceeded. (Provision for alterations or additional items only in case of an emergency. This may include transfer of funds from one account to another.)
8. Control and audit—enforcement.

III. THE REGION, A NEW GOVERNMENTAL UNIT[1]

THE PROBLEM OF METROPOLITAN AREAS

By Thomas H. Reed

"It will not do to assume that arterial highways are planned but that government just happens."

Plans must not only be made but executed. Great as are the difficulties in the way of carrying out a plan which affects but one city, they are as nothing to those which dog the path of the regional plan of a metropolis. It is proper, therefore, that we should consider not only the matter of organization for metropolitan plan making but of the organization of the metropolis for plan execution. Consistent and comprehensive results cannot ordinarily be expected from the

[1] A paper read at the International Conference on City Planning, New York, April, 1926. Reprinted from the *National Municipal Review*, July 1925, by permission of the editor.

mere voluntary coöperation of the authorities concerned. It is easy enough to understand why the directors of the "Plan of New York and Its Environs" pin their faith to voluntary coöperation. They have nothing else to pin to. The proposal to unite in any formal way the parts of three states which fall within the metropolitan area of New York would arouse suspicions and antagonisms enough to lose the battle before it is begun. Under such circumstances it is clearly the part of wisdom to preach voluntary coöperation. Given an intelligently directed and adequately supported planning agency to stimulate the multitude of diverse authorities to action, great things may be thus accomplished. In general, however, to rely on voluntary coöperation is to surrender all hope of substantial success.

NO SOLUTION SATISFACTORY AS YET

The objects of metropolitan organization are: first, to secure the execution of a uniform policy or plan with regard to that group of services properly supplied by local rather than by state or national enterprise and yet of interest to the whole metropolis; and second, to achieve an equitable adjustment of financial burdens between the various portions of the metropolitan community. A metropolis, however, is not an assemblage of individuals so much as a collection of communities in which individuals are already assembled. To these communities attach a complex of pride, prejudice and affection which give rise to what our Belgian friends call "esprit de clocher." Political scientists have long realized the error of ignoring the people's natural emotional responses, however irrational they may appear. No opportunity should be neglected for employing the sentiment of local patriotism in the service of local government. Metropolitan organization, therefore, must not fly in the face of the traditions and habits of the people, but must leave in existence, to the greatest extent possible, the customary units of local government.

A variety of attempts have been made to solve the metropolitan problem. None of them has satisfactorily solved it. We must seek a new method. To begin with, dependence cannot be placed on the enlargement of city boundaries to cover the metropolitan area. The process of annexation has always lagged far behind the spread of population. Take Brussels as an extreme example, with 215,145 people in the city of Brussels and 593,188 in the fourteen neighboring communes. Take Boston, with 748,060 inside the city, and 1,054,260 in a ten-mile zone outside. Paris made her last annexations in 1860, and approximately a third of the population of metropolitan Paris now dwell in the *banlieu*. The present boundaries

of the administrative county of London were fixed in 1855 and 3,000,000 people now dwell in the outer ring. Large-scale attempts to solve the metropolitan problem have usually been accompanied by recognition of the identity of existing units—some of them by genuine municipal federalism. The proposition of further municipal expansion, however, even so qualified arouses increasing opposition.

Cities grow after the manner of the forest. Around the parent tree a grove springs up, but seed are also borne afield, and some falling in favored spots sprout into new groves which grow with the first until all are merged in one spreading forest. When outlying centers of population have long enjoyed an individual life that strange spirit, civic pride, breathes through them. They cling determinedly to their individuality, and almost always resist annexation under any guise. The longer they have stood alone, the stouter their resistance. Recently a Royal Commission on London Government listened to the proposals of the London county council for a new central authority in London coextensive with the built-up area and a reasonable margin for development. Within this territory it was proposed to retain local authorities with powers somewhat enlarged over those of the metropolitan boroughs. The county council's proposals were opposed by the representatives of practically every other local government authority in Greater London. There may be a suspicion that these county-councilors, borough-councilors, town clerks, etc., were talking up their own personal influence rather than voicing the views of their constituents. My good friend, Maurice Vauthier, scholar and statesman of Brussels, has written me, anent a similar situation, of politicians "dont l'ambition s'accommode assez bien de la multiplication des mandats municipaux." Nevertheless, the unanimity of the opposition and its frank and thoroughgoing expression could hardly have existed in the face of a contrary public opinion. The creation in 1920 of a Greater Berlin, which by the way embraces an area less than half that of the Metropolitan Police District of London and only slightly larger than that of New York city, might seem to contradict my general statement. It is, however, explicable by the pressure of post-war conditions and a stronger habit of submission to state authority than exists in the English-speaking countries. Furthermore, the legal creation of Greater Berlin dragged along a good quarter of a century behind Greater Berlin as a fact.

A LIMIT TO BIGNESS

A growing conviction exists that there is a limit to successful bigness. Once a size has been attained, at half a million, or a million,

where the substantial economies of large-scale purchasing and organization have been reached, further bigness only hampers administration. A great city loses in the increasing impersonality of all its efforts more than it gains by the large scale of its operations. As a means of enlisting popular interest in government, great size is equally a failure. In the swollen metropolis the individual is lost and knows it. There was a time when men could be induced to give up local independence and vote for annexation to a big city so that they might say, "I am a New Yorker." To-day they seem to prefer to say, "I am a citizen of Bronxville." The growing army of suburbanites have forsaken the great city because they deliberately prefer the life of the smaller community. They can scarcely be expected to welcome reabsorption into the mass they have tried to escape. The day when the metropolitan problem could be solved by annexation is past.

It is easy in the perplexities of the metropolitan problem to turn to the supreme authority of the state for relief. In the centralized states of Europe, and, to a less extent in England, there is no doubt that some of the conflicts of interest characteristic of metropolitan conditions are smoothed away by the interposition of some department of the central government. I have no disposition to question the beneficent results of thus stimulating the coöperation of neighboring communities. It may prove especially effective where the machinery of common action, like the joint committees of the English planning act or the *syndicats* of communes provided by the French Code Municipal are at hand. There is, however, no administrative tutelage of local government in the United States, nor is likely soon to be.

Quite different is that species of state interference which puts in the hands of state officers or boards the performance within a metropolitan area of functions normally entrusted to local control. Such a unit as the metropolitan police district of London is to be justified as a national necessity not as an expedient for ordinary police administration. The metropolitan district commission in Massachusetts which provides parks, water supply, main sewers and more recently regional planning in the metropolitan area of Boston, is, it is true, appointed by the governor and has, nevertheless, found genuine popular support. Perhaps this is to be explained by the fact that nearly half the population and a decided preponderance of the leadership of Massachusetts is to be found within the district. There are a few other examples of such authorities, such as the Passaic Valley sewerage commission, Milwaukee metropolitan sewerage commission and some port authorities, but there is no likelihood of the general

adoption of this method of metropolitan government. It is too distinct a violation of the principle of home rule to be acceptable to the public. It means that the government of the district is not responsible to the people who support it with their taxes. Nor is it any more acceptable to the political scientist. We have discovered no other way of qualifying a community for self-government than by allowing it to govern itself. To remove from local control governmental services in their nature of local interest, is to weaken the self-governing capacity of the community. We must reject, therefore, direct state administration of metropolitan affairs as a general solution of the metropolitan problem.

AD HOC AUTHORITIES

In the absence of a comprehensive plan for dealing with the problems of the metropolis frequent resort has been had to *ad hoc* authorities. Apart from the perfectly obvious objection that only a flock of such authorities could give us the general solution we seek, they are usually open to attack on more specific grounds. Where the governing body of an *ad hoc* metropolitan authority is made up of representatives chosen by the cities concerned, it almost inevitably becomes unwieldy and thereby incapable of vigorous and responsible administration of complicated and difficult affairs. The metropolitan water board of London, for example, consists of 66 members representing the London county council, the city corporation, the county councils of the neighboring counties and numerous county-borough, and urban district councils. Its accomplishments have been sufficiently satisfactory, but its best friends admit it is too large, that it is fortunate in having nothing more complicated to administer than a going water service. There is also an unfortunate irresponsibility on the part of such an indirectly selected body, a difficulty that increases with the size of the body and the number of units of local government represented.

Where, on the other hand, the governing body is selected directly by the people it is objected that elections, already too frequent, are unduly multiplied. If there were to be several such authorities, as there must be, completely to solve the problem of metropolitan government, this objection would become overwhelming. It is almost impossible to induce the public to interest itself in local elections now. We cannot afford to diffuse further an interest already so attenuated. I would not be understood to condemn the establishment of particular *ad hoc* metropolitan authorities. The gravest reasons have usually prompted their creation. The rapid increase in their number in the

last few years is our best evidence of the reality of the metropolitan problem. Many of them, among which may be mentioned the Montreal metropolitan commission, the sanitary district of Chicago, and numerous port authorities, are to be credited with a liberal measure of success. Nevertheless, the fact remains that the creation of *ad hoc* authorities offers no thorough and permanent solution of the metropolitan problem.

A very interesting suggestion for dealing with questions of intercommunal interest has been introduced in the Belgian parliament by the celebrated burgomaster of Brussels, Adolph Max. I translate freely from a memorandum on the subject drawn up by M. Max and supplied to me through his courtesy:

> An intercommunal council should be instituted for the whole of the Brussels agglomeration to be composed of delegates of the several communal councils and have the duty of legislating upon all matters declared to be of intercommunal interest by the concurrent vote of all the communal councils of the agglomeration.
>
> If communal councils representing at least two thirds of the communes and three quarters at least of the population of the agglomeration pronounce in favor of the submission of a matter to the intercommunal council, the opposition of the minority will be the object of an examination by the permanent deputation of the provincial council (the body charged with the tutelage of communes). Upon its advice the government may constrain the minority to accept the submission of the matter in dispute to the intercommunal council.
>
> The decisions of the intercommunal council will be sent back not for ratification, but for execution to the communal councils. This execution will be obligatory.

There seems to be no immediate probability of the passage of even this measure, but it is an interesting and ingenious method of getting common action when the demand for such action is supported by an overwhelming majority of the metropolitan community. There is a difficulty in its application in America because of the absence of a state administrative authority endowed with power to pass on such questions. Here the delegation of functions to a metropolitan organization must—unless we change our legal habits—be preordained by law.

A NEW METHOD NECESSARY—THE REGION

It is easy to see that we are forced back upon the original proposition that our need is a new method. But what is that method to

be? A political scientist is on solid ground when he points out the defects only too evident in tried devices. He imperils his reputation when he suggests a new device. With diffidence, however, and in the hope that my proposal may at least serve as a starting point for more constructive thought, I propose the creation of a new unit of local government—the *Region*. Its size should vary with conditions. States predominantly rural might well get along without it altogether. It should be centered usually upon some relatively large urban community, and include the territory socially and economically dependent on it, although I would by no means bar such units as the "Niagara Frontier." Regard should be had at the same time to historic origins and sentimental ties. My proposition has nothing in common with the movement for *regionalisme* in France nor with the devolution of parliamentary functions to regional governments as has sometimes been urged in England. G. D. H. Cole, in his *Future of Local Government,* has suggested something of the thought I have in mind, but on a grandiose scale, and with communistic implications which I would emphatically repudiate. The areas I would establish are smaller, more numerous, and more subject to variation than are his. I can see no reason why small *regions* should not center on Albany, Syracuse, and Rochester as well as large ones on New York and Chicago.

My suggestion of the *region* is based upon the commonly neglected fact that the question of metropolitan areas is curiously interrelated with that of efficient areas for rural local government. The cost of the services expected of a rural government have in recent years mounted with extraordinary rapidity. Highways, which in these days pop first into the mind in this connection, are in reality but one item in the swelling total. These increasing costs are, as is well known, wiping out by inexorable economic pressure the small units of rural local government. Parishes, rural communes, town and townships are doomed by their financial incapacity. Even the larger areas such as our American counties are often unable to meet the demands upon them. For years our municipal reformers, their thought centered on urban needs, have been crying "city and county separation." They based their arguments on English practice. For nearly a century it has been a principle of English local government policy to make every city of 50,000 a county-borough, in other words to separate it, governmentally, from the rural area. A like principle at the same time decreed that all the built-up area around a borough should as rapidly as possible—exception being made of London—be included in the borough. These time-honored practices have suffered a check —for under their operation the population and taxpaying capacity of

the counties were melting away. We have perhaps been fortunate that our cry for city-county separation from rural areas around them is only robbing rural Peter to pay urban Paul.

TWO WAYS OF ESCAPE

From this dilemma there are only two avenues of escape: *First,* state subsidies to rural local government, with accompanying state control; *second,* the creation of large areas of local government centering upon and including the cities—*i. e., regions.*

Accepting, for the moment at least, the latter alternative we have a unit capable of handling

1. Planning, including zoning and the preservation of suitable forest and shore reservations.
2. Transportation, including street railways, buses and rapid transit lines.
3. Traffic, including highway construction and maintenance.
4. Water supply and electric energy.
5. Drainage.
6. Certain aspects of police, health and charity administration.

Such a unit can be effectively governed by a council, say of nine, elected at large by proportional representation, thus minimizing the evil of multiplied local elections. The financial burdens of the *region* can be equitably distributed by the creation of special assessment districts for such small part of its service as is not of direct benefit to the whole *region.* A regional system will not entirely obviate the necessity of state contributions as a means of equalizing local burdens in such matters as education and highway construction. The *region,* however, will be financially competent and will by the performance of the functions entrusted to it give ample relief to the overburdened rural treasuries. Within the *region* the relations of city and county can be readjusted without hardship.

Perhaps of equal importance to the possibility of successful operation is the fact that the creation of the *region* will not arouse the bitter popular opposition which meets every proposal for city growth by annexation. In the first place, it is not a means to the aggrandizement of any city. If, for example, a region were created in the Hudson-Mohawk valleys—centering on Albany it would not change the census standing of Albany, Troy, Schenectady, or any other city. It would affect the existence, dignity and essential independence of none of the existing units of government. The functions entrusted

to it would be strictly limited and would leave the lesser units a full complement of powers and duties. They would not be reduced to the unhappy state of London metropolitan boroughs, certainly not to mere election districts like the boroughs of New York. What is proposed is a uniform system applicable throughout a whole state—a systematic grouping of communities with common interests. The fact that it would relieve the financial difficulties of rural areas and small cities, would naturally tend to reconcile them to the surrender of a few functions to the *region*. I make no promises—no one dares promise what the popular response will be to any suggestion—but I hold out these reasonable hopes.

THE REGION AND CITY PLANNERS

The foundation of regional government is being laid, unwittingly almost, by the city planners. They are daily popularizing the idea of the *region*. Prophets of the new and better day, they have "cast off the moorings from the habitable past" and set forth to chart the course of progress. The alluring idea of the regional plan is already accepted by the enlightened and imaginative. The time is coming, however, when you must take deliberate thought of regional government. For without regional government the fabric of your dreams will fray out to tattered fragments. Governing is a matter of infinitely more difficulty, not intellectually but humanly, than planning. Regional planning encounters no more opposition than the propositions of speculative philosophy. Those who understand approve, and those who do not understand remain indifferent. The proposition of regional government, however, at once rouses antagonisms. It is a new political idea, and many (conservatives and radicals alike) are suspicious of new political ideas. It means the breaking up of vested political interests—some readjustment in party activity, some pruning of the tree of patronage. You will have beautiful regional plans on paper long before you have regional organizations fit to carry them out. The conclusion is inescapable. If it is worth while to plan for streets and parks and terminals, it is worth while to plan for institutions of government. It is the way of specialists to take for granted everything outside their specialty. It will not do, however, to assume that arterial highways may be planned but that government just happens. The one requires and deserves planning as much as the other. Two great mementos the civilization of each age has left to its successors—its structures and its institutions. If there is any difference in the permanence of these memorials it is to the advantage of institutions. Men will be reading the Code of Justinian long

after the last three-cornered brick has crumbled from the Pantheon. Let us plan our physical surroundings and our institutions so that they may live on worthily together.

112. BRIEF REVIEW OF CITY PLANNING IN THE UNITED STATES, 1924[1]

By Theodora Kimball Hubbard

The roster of cities and towns from which there has been some kind of city planning news in 1924 is about three hundred and fifty, a hundred more than in 1923. Sixty of these places had a population less than 5,000, over thirty between 5,000 and 10,000, over eighty from 10,000 to 25,000, over a hundred and ten from 25,000 to 100,000, while fifty-seven were among the sixty largest cities. The 1924 figures from the National Conference on City Planning indicated that there were some three hundred city planning and zoning commissions in the country, most of which were active.

These statistics go to show that official recognition of the practical value of city planning has become widespread. Groups and interests formerly unconvinced or antagonistic are often turning into leaders. The realtors of the country are backing the movement more strongly than ever. The City Planning Division of the American Society of Civil Engineers is conducting an educative series of meetings, with valuable published proceedings. Programs of the National and State Municipal Leagues, the American Society for Municipal Improvements, the Chamber of Commerce of the United States, the National Automobile Chamber of Commerce, are all including city planning as an established municipal responsibility. In addition to the splendid work for zoning carried on by Secretary Hoover through the Division of Building and Housing, he was responsible for calling the National Conference on Street and Highway Safety and appointing a City Planning Committee as one of its eight subdivisions.

Foreign recognition of American achievement in city planning comes this year with the holding of the International Town Planning Congress in New York. To our European friends it must be apparent that we are making progress,—in such recent regional projects

[1] Continuing the series of reviews begun by Charles Mulford Robinson and carried on since 1919 by the writer. For a fuller account of city and regional planning for 1924 with a bibliography of plan reports, the reader is referred to the April, 1925, issue of the new quarterly *City Planning*. Reprinted from the *National Municipal Review*, May, 1925, by permission of the editor.

as the Detroit Super-Highway Plan, reaching far out into the undeveloped suburban territory with 204-foot thoroughfares; the great interstate and county park schemes of New York state; the waterfront reclamation and Michigan Avenue achievement in Chicago; the huge bond issues recently voted by the citizens of St. Louis and of Philadelphia; the port development of Baltimore and Seattle, the studies of the Regional Plan of New York and the Port of New York Authority; the rehabilitation of our Federal City; the many new industrial and residential towns and large land subdivisions under construction. . . .

ZONING AND PLATTING

The zoning progress of the year has been astounding. The figures of the department of commerce show that sixty-two municipalities adopted zoning ordinaries in 1924, bringing the total number up to about three hundred and twenty. At last reports, thirty-three states had zoning enabling acts. Among the important cities zoned were Boston and its neighbor Cambridge, Albany, Utica, Wilmington, Del., Columbia, S. C., Cincinnati, Davenport, Minneapolis, Kansas City, Kan., Omaha (revised ordinance), Bismarck, N. D., and Portland, Ore. Notes on the important zoning decisions of the year will be found in Mr. Williams' department in the *American City*.

The Boston ordinance is based on most thorough studies directed by Mr. Comey, backed up by Mayor Curley's advisory committee. It provides for single-family residence districts as have also a considerable number of smaller Massachusetts communities. In a memorable decision, the supreme court of the state has declared that such regulation is constitutional. The Boston zoning campaign was well conducted and its history appears in the final zoning report just published. Nearly twenty of the forty municipalities in the Boston Metropolitan district are now zoned, a higher record than that of Los Angeles county, California, where sixteen out of forty-four cities had zoning ordinances in November, 1924.

The Portland ordinance, drawn by a joint committee of city planning commission and the Portland Realty Board, and passed by an overwhelming majority, is of particular interest because of the failure of the previous ordinance on population referendum. Two other leading western cities have ordinances under way, Denver and Salt Lake City. A local enabling act of July, 1924, makes it possible for Buffalo to go ahead with zoning as part of her comprehensive program. The situation in Philadelphia remains practically unchanged, although the zoning commission has made a restudy of the entire city.

A new enabling act including provision for a board of appeals is sought for in 1925 and may break the deadlock.

The unfortunate court experience of Baltimore, coming on top of the New Jersey decision, have nevertheless left undaunted the Baltimore zoning board, which had succeeded in having an emergency ordinance passed until new legislation can be secured. In St. Louis unscrupulous builders have proceeded to put inappropriate buildings in home districts since the zoning principle has been temporarily nullified by the Missouri courts. The public will undoubtedly force a way through the intolerable situation thus created. The New Jersey tangle culminating in the Nutley decision and now ameliorated by the new enabling act of 1924 (modeled on the department of commerce standard act) is discussed at length in Mr. Bassett's invaluable new pamphlet "Zoning Practice in the New York Region," published by the Regional Plan of New York.

Two more of Mr. Whitten's excellent zoning reports have appeared in 1924, for Cranston, R. I., and West Hartford, Conn. (ordinances passed in both places). In the West Hartford report there is a section, "Comprehensive Development Plan for Unbuilt Areas," in which Mr. Whitten tries to make zoning lead up to the adoption of a plan to combine zoning, platting, and general planning powers in controlling the development in unbuilt areas.

The number of cities which now have control over platting and land subdivision has increased materially. Location of major thoroughfares and of parks and playgrounds on the official map of unbuilt areas and the enforcement of this map is a subject of prime importance. The recent contributions of Mr. Bassett (published by *Playground*) and of Judge Nichols (published by Massachusetts Federation of Planning Boards) are of great importance.

STREET CONGESTION AND THOROUGHFARES PLANS

Street traffic and street congestion have undoubtedly been the storm center of city planning this past year. In December there was held in Washington the first National Conference on Street and Highway Safety, called by Secretary Hoover, at which the eight committees appointed by him earlier in the year made reports, which were published, as well as the proceedings of the meeting.

Another important traffic conference was devoted to the problems of the New York region, called at the instance of the Committee on the Regional Plan of New York and fourteen other interested bodies in May, 1924, also with published proceedings. The unbearably acute situation in New York has given rise to proposals for arcading,

double and triple decking, such as were discussed especially by Messrs. Tuttle and Corbett before the City Planning Division of the American Society of Civil Engineers in January, 1924. The transit report of Mr. Turner to the New York transit commission makes two long double-deck streets part of his program for permanent relief. The New Jersey state highway commission has designed a special commercial traffic way primarily as an extension of the Hudson vehicular tunnel. Studies for further vehicular tunnels or bridges to connect with New Jersey have been made by the Port of New York Authority.

Los Angeles claims the greatest traffic congestion of any city in the United States due to enormous growth of automobile ownership and all-year-round use. The Los Angeles traffic commission, a voluntary body acting with official coöperation of city and county, secured the services of Messrs. Olmsted, Bartholomew, and Cheney to make a comprehensive study of the traffic situation, reviewing all previous studies, and to report on a major traffic street plan (published May, 1924). Detroit's progress in realizing the magnificent superhighway plan is inspiring and in scale with the tremendous automobile development of the region. Mr. Phillips, consultant to the Detroit city plan commission and several other communities of the region, reports that the plan will probably be carried for at least thirty-three to forty miles out.

Major street plan reports have been published during 1924 for South Bend and for Toledo, prepared for the official commissions by Mr. Bartholomew. Mr. Swan has one for Harrisburg, Pa., in press, Mr. Bibbins directed the preparation of a complete thoroughfare plan for Indianapolis, and the Beeler Organization reported on the traffic situation in Atlanta. . . .

113. COÖRDINATION OF SOCIAL WORK IN KNOXVILLE[1]

By Elizabeth Sims Brownlow

Under the council-manager form of government, social work in Knoxville is being coördinated under the leadership of a governmental agency—the department of public welfare.

An interesting situation is presented, since the usual order is reversed, and instead of trained social workers in private agencies

[1] Reprinted from the *National Municipal Review,* May, 1925, by permission of the editor.

trying to persuade reluctant city officials to adopt, or at least to recognize, standards of work and service, there is a department of the municipal government endeavoring to raise the standards in all fields of social work, both for public and private agencies.

This leadership is supplied by the director of public welfare, who was chosen because of his experience and training, and is given legal sanction by the city charter, which not only provides for his administration of municipal activities within the welfare field, but also specifically charges him with the duty of study and research into all social problems of the community. . . .

IMPROVEMENT IN CITY SERVICES

The new charter of Knoxville provided for a department of public welfare with a director at its head, appointed by the city manager and responsible only to the city manager, who must be a person with training and experience in the work to be administered. Under this department was grouped the work scattered throughout the city departments consisting of the administration of the general hospital, home of delinquent women, employment bureau, the supervision of parks and playgrounds, and the health activities.

The department was organized with the following divisions: 1. Hospitals; 2. Bureau of Health; 3. Juvenile Court and Detention Home; 4. Bureau of Recreation; 5. Employment Bureau; 6. Bureau of Social Service.

The general hospital had the usual history of political control, corrupt administration, investigation and reform. When the city manager government came into power the reform element was supposedly in control. The superintendent was a former factory superintendent without training or particular aptitude for hospital management. Disorganization and dirt were the most visible shortcomings. A trained hospital organizer was soon put in charge, the primary needs of sanitation were met, the training school for nurses was reorganized, a medical social worker installed, and an out-patient department established.

Within the year the hospital was accredited by the American College of Surgeons and accepted as a member in the American Hospital Association. In the training school for nurses, educational requirements were established and no student accepted who had not had at least two years of high school work. In the near future it is hoped to raise the standard so as to require high school graduation. The hospital is thus fast assuming its threefold duty to the city: (1) treating the sick; (2) teaching and training doctors, nurses,

and social workers for service; (3) contributing information and personnel in its handling of problems of public health and personal hygiene.

The home for delinquent women was originally founded as a home for friendless women, but was finally turned over to the city in 1917 for the use of women prisoners. It is now used as a detention home for women under treatment by the city for venereal disease.

The establishment of a modern bureau of health is probably the most important part of the first year's work of the new department. There is a full-time trained health officer in charge, with adequate laboratories, inspection service, contagious diseases service and city physician. The venereal disease clinic at the health center is operated by the bureau.

Some of the activities for the past year especially noteworthy are: an active campaign to minimize commercial vice; a standard milk ordinance and regulation of the dairying industry; two contagious disease campaigns, typhoid fever and smallpox. When the new city government got under way a smallpox epidemic was raging, there being over 700 cases in the city and environs. A campaign of education was begun on the necessity of vaccination which was furnished free by the health bureau to those unable to employ private physicians. The county health authorities coöperated and for the first time required vaccination of pupils in the country public schools. As a result the first case of smallpox this winter was not reported until the last week of February. To the first of March only three cases have been reported. Owing to the lapse in the practice of vaccination throughout a great part of this region, smallpox has again become one of the chief anxieties of the health officer of the cities. An epidemic may occur during any of the winter months.

When the new health officer arrived in the city last June he was confronted with a typhoid epidemic, or what threatened to be. Protective health measures were immediately taken, inoculation was urged, and was furnished free to those unable to pay. Springs in the surrounding country were examined and placarded when found to be polluted. Dairies were examined and some closed. Later a new milk and dairy inspection ordinance was passed.

DEATH RATE LOWER

One result of this health work has been to reduce the general death rate. In 1923 this was 15.4, but in 1924 it dropped to 14.3 per

1000 population. The reduction of 1.1 per 1000 population meant the saving of 100 lives in our city last year.

The bureau of social service operates in connection with the clinics, hospitals, and child caring institutions. Two trained social workers have been employed and another is soon to be added.

The bureau of recreation has control of the parks and playgrounds. The latter to the number of six were started by the Community Service Council and taken over by the city.

The employment bureau was a leftover of war days. It has continued under municipal control as a matter of course. There are two employees, one paid for by the city and one by the federal government.

The juvenile court is a county institution though all the expenses except the salary of the judge and part of the salary of probation officers and clerical help are carried in the budget of the welfare department. The detention home opened last year is under the direct control of a board of trustees, two appointed by the city council and one by the county court. It is however under the supervision of the welfare department. There are two full-time probation officers, a man and a woman, and two part-time colored officers.

The city gives no outdoor relief. The almshouse is under the county, which also controls the industrial school for children. Commitments are made by both county and juvenile judges.

Mothers' pensions in the state depend on appropriations made by the county courts. Knox county appropriated $100. Even that has not been paid out.

In addition to the development of the department of public welfare a woman's bureau has been established in the police department. The policewomen and probation officers of the juvenile court constitute the only force in the field of preventive, protective social work in the city. There is no juvenile protective association or like organization.

The public school system has developed but little along social lines. There is medical inspection and five school nurses (now under the supervisor of nurses of the bureau of health). Recently classes for backward children have been started. There are no trade schools, no vocational direction, or scholarships. There are five attendance officers who are assisted by the juvenile court probation officers in the enforcement of the school attendance law of the state. The issuing of employment certificates to children is placed by the law with the superintendent of schools or someone designated by him. This function has been handed over to the Associated Charities. The school board is elected by the people and appoints the superintendent of schools. A new superintendent has been appointed to take the

place of the one who has been the head of the school system for fourteen years. . . .

GOVERNMENT TAKES THE INITIATIVE

The Community Chest was organized three years ago. It was purely a financial federation and its only development has been the establishment of a social service exchange. This was the first successful effort to bring about coöperation among the social agencies of the city. Each agency had been more or less in a compartment, doing its own work without much recognition or understanding of the work of other agencies. After a survey of the agencies participating in the chest a Social Workers' Club was organized. In this club were the beginnings of a better understanding of the oneness of the job they were all engaged in. When the director of public welfare in the new government was appointed, the time was ripe for the sort of trained leadership he could furnish in the social field. He was instrumental in the formation of a Council of Social Agencies and was elected its first president. There was no evidence of any feeling that a public official was out of place as a leader of the social forces of the community. The old order of things had been reversed; the education of public officials by trained workers of private social agencies had given place to the education of untrained workers of private social agencies by a trained public official. The new order was made possible by the city manager form of government which furnishes trained leadership for the development and expansion of public social service, and for the correlation of private social service. To the workers in both fields falls the responsibility of educating the public.

In the division of public and private social work the trend has been toward the taking over by the public agency of a service which the private agency has demonstrated is of value to the whole community. In the past the private agency has done most of the experimenting. This may not hold true in the future as governmental agencies enter more largely the field of preventive work with its laboratories of research.

To trace the division of social work in Knoxville or any community, and attempt to determine approximately the deciding factor in each decision as to whether governmental or voluntary societies should take charge of the work, or of a certain section of the work in each special field, would require a detailed study and survey. This would have to include a study of the locality; its history and present status, political, economic, industrial, educational and social; of the

particular group interested in the particular work to be transferred. A piece of social case work not to be compressed within the covers of a magazine.

It is possible to do little more than generalize in discussing the past. It is difficult to avoid the temptation of prophesying in discussing the present. In little more than a year social work in Knoxville has made a decided advance. It is no longer compartmented, but coördinated. The proofs of its changed spirit are found: in the organization of the Council of Social Agencies; the consolidation of the nursing services under one head, and that governmental; and the willingness to look to the department of public welfare for leadership.

114. SUMMARY OF RECOMMENDATIONS RELATIVE TO THE ORGANIZATION OF THE PROPOSED BUREAU OF HEALTH AND HOSPITALS[1]

In order that a clear picture of the proposed consolidation of the health department and the city hospital may be had, the major recommendations providing for the organization of the proposed bureaus of health and hospitals are herewith recapitulated. It is recommended:

1. That a bureau of health and hospitals be created, to combine the present health department and city hospital, under the direction of the health officer.

2. That the bureau of health and hospitals include the following major service units:

a. General health service under the immediate supervision of the health officer.
b. Hospital service under the supervision of a director of laboratories, responsible directly to the health officer.

3. That the general health service includes the following divisions, each under the supervision of a competent chief:

a. Executive division—as at present.
b. Division of vital statistics—to consolidate present vital statistics work of the health department and city clerk's office.
c. Division of child hygiene—to consolidate present child hygiene work with the parochial school nursing service.

[1] Introduction and Explanatory Excerpts from *A Survey of the Government, Finances and Administration of the City of Newark, N. J.*

d. Division of communicable diseases—to consolidate the present division of contagious diseases, division of tuberculosis, division of venereal diseases and disinfecting division.
e. Division of industrial hygiene—a new division for the investigation of sanitary conditions in industry and the prevention of disease among industrial workers.
f. Division of sanitation—as at present.
g. Division of food and drugs—as at present.

4. That the present division of plumbing inspection be transferred to the division of building inspection of the department of public safety.

5. That the hospital service includes the following service units:

a. General ward service—as at present.
b. Out-patient service—the dispensary service now located at the health department to be transferred to the city hospital and to become an integral part of that institution, and the district physicians of the present health department to be attached to such out-patient department.
c. Psychiatric service—to consolidate at the city hospital under a competent director, the present mental hygiene bureau of the health department and all out-patient and hospital work in the care of mental and nervous patients. For this purpose the creation of a psychiatric pavilion is recommended.
d. Contagious disease service—to be provided for through the erection of a contagious disease pavilion in which all cases of contagious disease may be cared for instead of providing for such cases at the county hospital.
e. Convalescent home service—to be provided for through the erection of a convalescent home at Ivy Hill or other suitable location.

6. That the city laboratory be placed under the supervision of a full-time director of laboratories, responsible directly to the health officer, and that such laboratory consolidate the following service:

a. City chemist—now attached to the food and drug division of the present health department.
b. The laboratory division of the present health department.
c. The pathological service of the city hospital.

Beard, (4th. Ed.), 731–766.
Kimball, *State and Municipal Government,* pp. 454–559.
Ogg and Ray, (2nd Ed,), pp. 867–878; 879–892.

XXIX

THE COUNTY

The county has been called the "dark continent" of American politics, and in many cases it has deserved the appellation. County government developed in an era which was primarily agricultural. As one city after another has fallen from the hands of the spoilsmen, these political parasites have made the county the citadel of their power. It has been easy to do this because the county with its great number of elective and appointive officials, and its large expenditures, has furnished a fine opportunity for the political rings to entrench themselves.

A county is an organ of government without a head. The county-manager plan which has been proposed eliminates the evils of lack of direction and provides a responsible officer who will devote all his time and energy to the job. The county is acquiring new functions at the expense of the township because twentieth-century problems, such as road-building and sanitation, cannot be solved by twenty or thirty townships acting independently. The power must be centralized, and the county is the place for such centralization. In the solution of these newer problems, economical, efficient, and authoritative direction is essential.

As cities have grown up and absorbed whole counties, or as county problems have become essentially urban in their nature, a new form of county government is needed. A plan has been proposed for the consolidation of city and county, in order to eliminate the duplication of officers and the needless waste and expense.

"The county is the last ditch into which the old-fashioned political system has been driven." Because the county is a great social and economic unit, a form of government designed for an agricultural society cannot function without waste and inefficiency.

115. COUNTY AND TOWN GOVERNMENT[1]

Introductory Statement

THE COST OF GOVERNMENT

The expenses of government in the State of New York for the year 1923 may be roughly estimated at $621,500,000. This figure

[1] From State of New York, *Special Joint Committee on Taxation and Retrenchment*, 1923, pp. 9–17.

does not include any expenses of the Federal Government, but does include those of the State and local governments, and all expenses for education. Expenditures from bond issues for improvements or school grounds and buildings are omitted. The figure represents, therefore, only the regular running expenses.

This total of $621,500,000 is to be divided among the various units and activities somewhat as follows:

TABLE NO. 1

Distribution of Estimated Running Expenses of Government in the State of New York for the Year Ending June 30, 1923 [2]

Estimated expenditure for	Amount	Per Cent of Total
State Government	$68,000,000	10.9
County Government	39,000,000	6.3
City Government	290,000,000	46.7
Town Government	21,000,000	3.4
Village Government	9,500,000	1.5
Education (all units)	194,000,000	31.2
Grand Total	$621,500,000	100.0

These figures are presented here in order to indicate the importance of governmental expenses in the State.

The cost of government naturally varies in the different counties. This is made clear by Chart No. 1 which shows by counties the average cost per family for the running expenses of county, town, village and city government. Education is excluded in these figures. The burden per family ranges from $53 in St. Lawrence county to $201 in Hamilton county. In the chart the counties are divided into six groups on the basis of these costs.[3]

INCREASING COSTS AND SERVICES

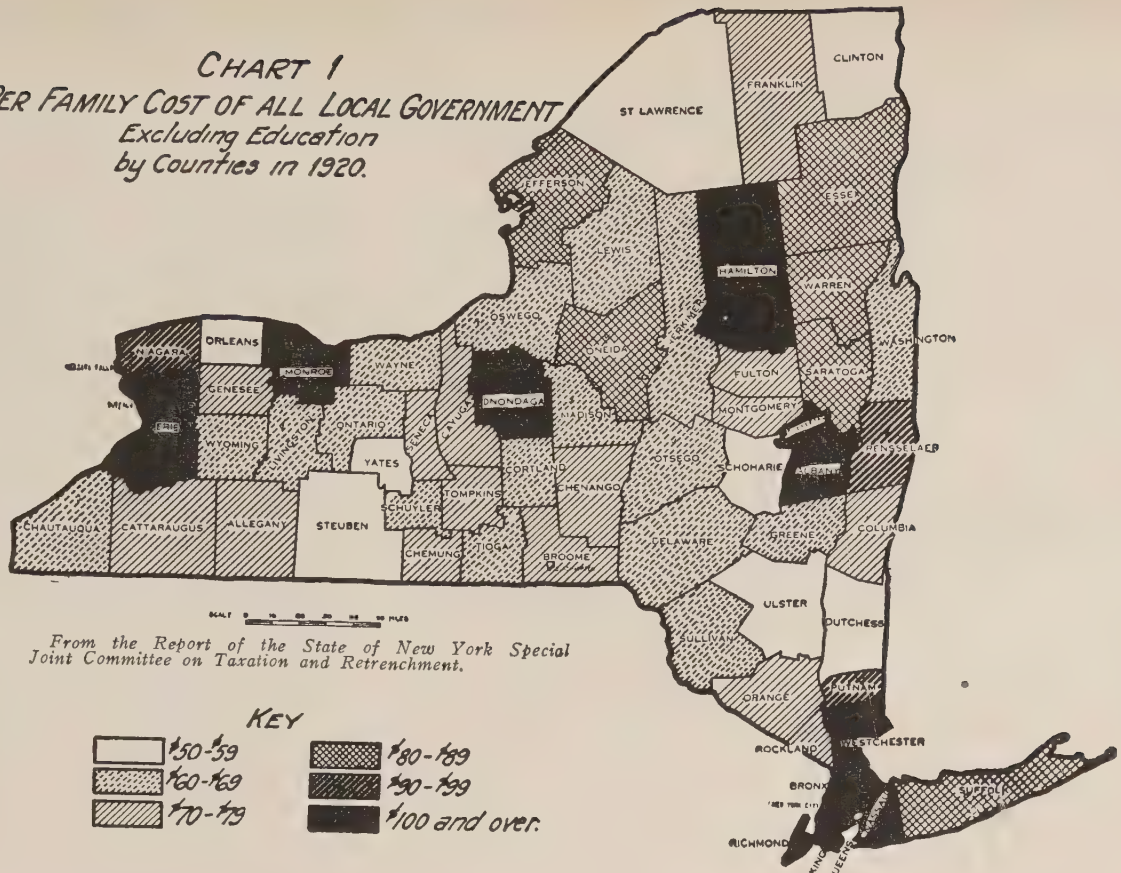
The costs of government have been increasing rapidly during the past fifty years. In the past ten years these increases have been especially pronounced, due to the change in the value of the dollar as a result of the war. This committee has already shown that the increase in this state from 1910 to 1920 was approximately 107 per

[2] Based on cost statistics presented in Part III of this report; educational costs furnished by R. M. Haig, Educational Finance Commission. It is assumed in this table that the governmental cost payments of the state government will approximate those for 1920. The actual payments for 1921 were $112,650,636, including education.

[3] This chart is based on statistical material presented in Part III.

CHART 1

PER FAMILY COST OF ALL LOCAL GOVERNMENT
Excluding Education
by Counties in 1920.



From the Report of the State of New York Special Joint Committee on Taxation and Retrenchment.

KEY

$50-$59	$80-$89
$60-$69	$90-$99
$70-$79	$100 and over.

cent.[4] It is unfortunate that there is no simple way of measuring in comparison with these costs the services which government is rendering in return for the large outlay made. Making allowance for the change in the purchasing power of the dollar, has the increase in governmental service kept pace with the increase in costs?

The Committee is not able to answer this question fully. We believe, however, that the material we are presenting in this report bears directly on this problem. If similar studies had been made in 1870 and in 1900, we would be in a position to make general comparisons of service rendered as well as of increasing costs.

ANTIQUITY OF PRESENT LOCAL GOVERNMENT STRUCTURE

The system of local government which we have in the State of New York in our counties and towns dates back a great many years. Certain modifications have been made, of course, in the functions of various offices, and some new offices have been added in specific instances, but in the main the structure of local government and the way in which local problems are handled have not been changed since the State was created. In fact, some aspects of present institutions have not been altered since the English established the provincial government of New York after driving out the Dutch in 1664.

The following illustrations are presented by the Committee to show the antiquity of our present institutions of local government:

1.—*The Town*

The Duke of Yorke's Laws, promulgated in 1676, recognized the town as the unit of local government. Before 1700 the structure of town government had been worked out to such an extent that the town offices which existed then have been brought down to the present time with very few changes or additions. This can be shown best by listing the town offices in existence at that time and those to be found in a typical town of today.

TABLE NO. 2

Town Officials in 1691 *and in* 1923

1691	1923
Supervisor.	Supervisor.
Constable.	Constable.
Collector.	Collector.

[4] Legislative Document 1922, No. 72, page 24.

Town Officials in 1691 *and in* 1923

1691	1923
Assessor.	Assessor.
Clerk.	Clerk.
Highway commissioner.	Highway superintendent.
Overseers of the poor.	Overseers of the poor.
Justices of the peace (regarded as county officials).	Justices of the peace.
	Town auditor.
	Health officer.

It will be noted that only two officers have been added to the official roster of the typical town. The authorization of special districts is the only important change in town government since 1691. The first of these administrative areas appears to have been created after 1880 when county Boards of Supervisors were authorized to organize outside of incorporated villages and cities.

It is interesting to note, also, what has happened to town functions in connection with bridges and the dog tax. Under the present highway law, the towns are responsible for building and maintaining all bridges even where the highway running over the bridge is built and maintained by the State or the county. The result of this provision has been that many fine highways are interrupted by poor bridges, or by the absence of bridges, in towns that cannot or will not build and maintain them. This matter is discussed in some detail in Chapter VI and is mentioned here only to call attention to the fact that the cause for this unreasonable and unsatisfactory situation is primarily historical. 'Way back in the old days, before the State or the county built roads, when the post roads, and privately-owned turnpikes and plank roads were the only highways outside of the meager town systems, the towns were made responsible for public bridges. This situation can be traced in the law as far back as 1801, and probably existed in custom for fifty years before that. When the town was made responsible, it was doubtless considered a great reform. But when the State and county went into the road business, this old provision of law was left standing. It is another relic of the past and serves to interfere with good government today.

The method of handling the dog tax is a good illustration of an old institution that has been patched up from time to time. It has been completely overhauled four times. First it was assigned to county officials; then, to town authorities; later, it was put under a State department; and only recently, it was turned back to the towns

and counties under general State supervision. And even now, new plans are being discussed.

2.—*The County Officials*

The Duke of Yorke's Laws also recognized the county as a unit of local government, and carried over into the colony the offices, powers and methods of appointment that existed in the corresponding division to be found in England at the time. The county system which developed during the colonial period was embodied in the first State constitution in 1777 and has been perpetuated by succeeding instruments till the present time. The functions of certain offices have been modified, one office has been eliminated, and several have been added, but the main features of county government structure have not been changed in the 146 years since New York became a State. County offices may be listed in the same way as town offices to show those which have come down from the colonial period.

TABLE NO. 3

County Officials in 1777 and in 1923

1777	1923
Board of supervisors.	Board of supervisors.
Sheriff.	Sheriff.
Coroner.	Coroner or medical examiner.
County judge.	County judge.
	Surrogate.
	Judge of the children's court.
Justice of the peace.	(Justice of the peace now a town officer).
County treasurer.	County treasurer.
	Comptroller or auditor.
Loan officer.	Loan officer abolished; functions transferred to state comptroller.
Clerk, board of supervisors.	Clerk, board of supervisors.
	County clerk.
	District attorney.
	County attorney
	Superintendent of poor.
	Child welfare board.
	County superintendent of highways.

From these examples, it will be seen that our system of local government has many elements that go back to the earliest days, and

that where changes have been made, they are of a patchwork character.

COUNTY GOVERNMENT IN OTHER STATES

The Committee has made a brief study of county government throughout the United States. In the light of this, the New York State system of county and town government stands out as rather unusual. It was surprising to us to learn that very few States are following our system even in its broad outlines. In making this comparison it has, of course, been impossible to go into detail, as we have not yet had opportunity even to examine all of our own counties. We have relied at this point mainly on the expert investigation of the organization of county government by others.[5]

We have tried to compare two characteristics of our New York system with the systems in other States. These are:

1. The management of the county by a large elective board.

2. The formation of the county board from elective town officials.

The two maps of the United States on the following page (Chart No. 2) show in a general way the facts which this comparison has brought out. On the first point, the size of the county board, it will be seen that New York falls in the group with five States with large boards (Nebraska, New Jersey, Michigan, Virginia and Wisconsin). In five other States, some of the counties have large boards (Arkansas, Illinois, Kentucky, Missouri and Tennessee).

On the second point, the constitution of the county boards exclusively of town officials, New York is to be grouped with only five States (Nebraska, New Jersey, Michigan, Wisconsin and part of Illinois). In the majority of States there is no town government whatsoever, town functions being handled by the county or by boroughs, villages and cities. The rural areas are governed by the county directly. In the New England States the county exists for judicial functions, almost all other functions of local government falling to the towns in the rural areas.

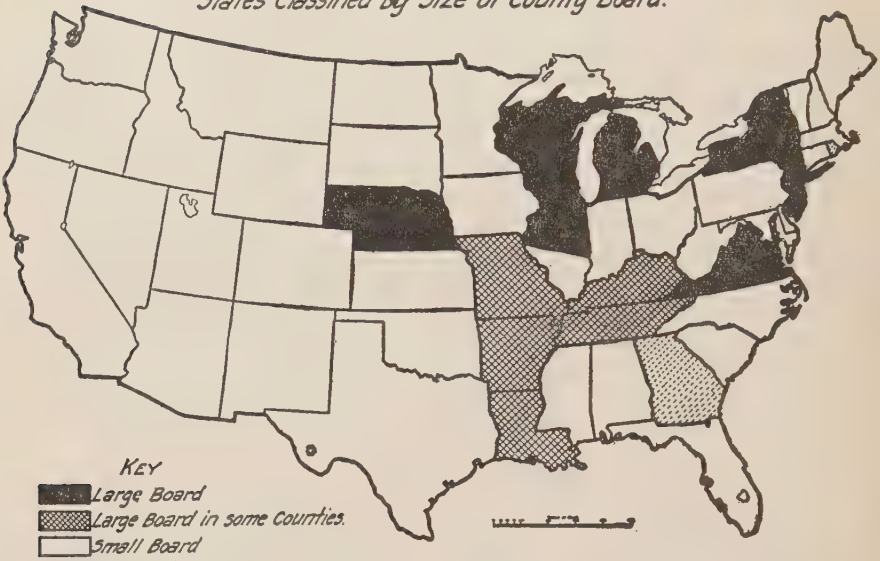
From these facts it appears that the New York State system has not been regarded as desirable in other States, in so far as the size and constitution of the county board are concerned.

[5] Porter, *County and Township Government in the United States;* Fairlie, *Local Government in Counties, Towns and Villages;* Maxey, *County Administration;* National Municipal League, *Documents.*

CHART 2

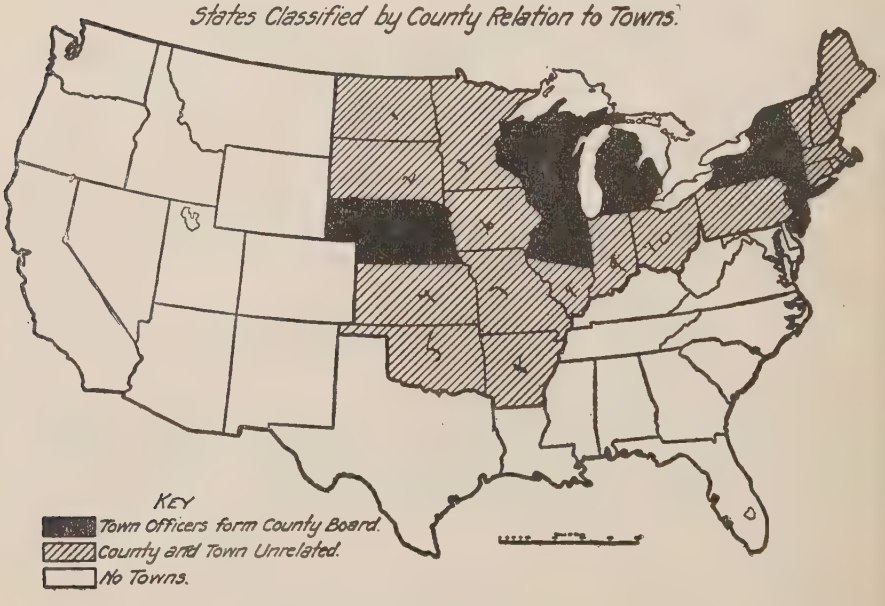
COUNTY GOVERNMENT IN THE UNITED STATES

States Classified by Size of County Board.



From the Report of the State of New York, Special Joint Committee on Taxation and Retrenchment.

States Classified by County Relation to Towns.



NEW CONDITIONS AND THEIR EFFECT

Since the day when the general plan of local government was laid out in this State, very large changes have taken place. Many complex forces have been at work. The growth and movement of population: wealth; industry; new inventions; immigration; the opening up of the West; the extension of education; and changing ideas of the function of government have each played their part. In so far as local government is concerned, the most important changes have arisen from two sources: first, the growth and movement of population; and second, the development of means of intercommunication.

1.—*The Growth and Movement of Population*

When our present scheme of town government was set up the entire population of the State was less than 18,000.[6] It has now grown to over 10,000,000. Until 1875 our population was predominantly rural. Today it is predominantly urban. The movement of population in this State has been away from the farms and towards the cities. The extent of this movement during the ten years 1910 to 1920 is very significant. Chart No. 3 shows on a map of the State the counties which have increased or decreased in population during the decade. A careful study of town population shows that a very great majority of the smaller towns have lost in population. With few exceptions the only increases have been in those towns which lie near the great cities.

As a result of this movement of population there are many towns in the State which have become so small that they do not need and cannot support the relatively extensive town governments that were established for them many years ago. Towns have been mentioned to the Committee in which every able-bodied man is employed at one time or another by the town-government.

116. THE COUNTY MANAGER PLAN[1]

WITH A REVIEW OF THE EFFORTS TO ADOPT IT

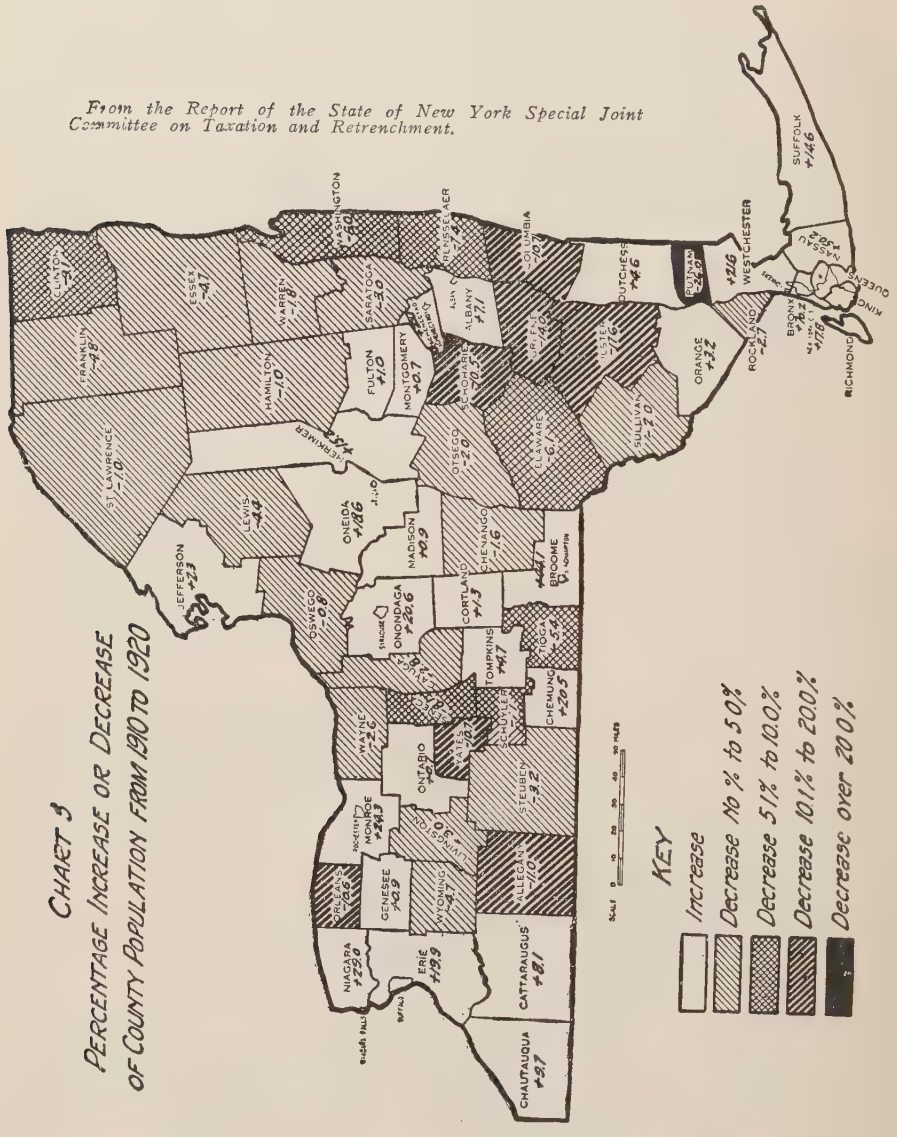
By Richard S. Childs

The ordinary form of county government provides a representative board elected frequently from township districts and called

[6] In 1698 the population was 18,067.

[1] Reprinted by permission of the National Municipal League, 261 Broadway, New York.

From the Report of the State of New York Special Joint Committee on Taxation and Retrenchment.



"Board of Supervisors" or "Commissioners"; a Sheriff, County Clerk, Prosecuting Attorney, Treasurer, Superintendent of the Poor, Coroner and Judge of the County Court, etc., all separately elective.

As a form of government—if indeed so formless and ramshackle a thing can be said to have a form—it is distinguished from customary practice in other jurisdictions by the lack of any executive; there is no President, Governor or Mayor, nor any office remotely comparable thereto. None of the county officers has any appointive power beyond his own deputies, clerks, etc. The Board of Supervisors holds the purse strings and the other officers must come to it, hat in hand, once a year for money, but they come strong in the knowledge that their salaries or fees are fixed by law anyway, and in fixing the appropriation, the supervisors have little discretion. Indeed it is more usual for each officer to run his own office according to his own lights and his only contact with the Supervisors may be when vouchers, covering expenditures already made, are presented for the Supervisors' audit and approval, such piecemeal action being about as near to a budget and an appropriation as a typical county board ever gets. Individual supervisors have power to annoy the other county officers and it pays the latter to keep friendly, but the board as a whole would be helpless and ineffective if it attempted to utilize its power of the purse to enforce economy and efficiency among its independently elected associates. Moreover, being a board —a board that meets once a month or once a quarter—it is quite unable to operate as an executive or follow its resolutions through to secure whole-hearted compliance. When there is a controversy between county officers, their only common superior to which appeal may be made is the remote legislature which, by special law, may for example settle the issue of what salary the Sheriff may pay his wife for services as cook in the county jail.

In principle, and in practice, as abundant experience in almost any county will attest, each elective officer is in effect an independent government in himself. The typical county is not a government but a collection of about seven government-ettes.

The conditions that result are described in "Ramshackle County Government" and must not be detailed here.

There was a time when cities were in much the same loose-jointed condition; the strengthening of the mayor's power as an executive was the cure. In the same way the various state governments have recently been discarding minor elective state officers and isolated boards and commissions and setting up a series of compact and orderly departments under single heads appointed by the Governor like the President's cabinet. The most perfect of all such rearrangements is

the city manager plan, wherein the representative body appoints and directs a manager who in turn appoints and directs all the department heads. "The Story of the City Manager Plan," another National Municipal League pamphlet, must be referred to for the facts on that movement. And as this city manager plan has the complete approval of all political scientists and seems destined to be adopted by most American cities in the course of another ten or twenty years, it would seem reasonable that county government should learn from this intensive municipal experience. It has been in fact on just these lines that the best attempts at county government reorganization have been made.

AS AN ARM OF THE STATE

The county is not strictly like a city, however; it is, on paper at least, somewhat more of an agent of the state, since its three most important officers, the Sheriff, Prosecuting Attorney and Judge, are executing state laws and are supposedly arms of the state government. In the Federal government there are the corresponding officers, the United States Marshals, the United States District Attorneys and the Judges of the Federal District Courts, but all these are appointed by the government whose laws they enforce, the first two being under the Attorney General, who in turn is appointed by the President. It would be logical for the Attorney General of the state, likewise, to appoint the Sheriffs and Prosecuting Attorneys and maintain the jails and courts, and for the governor to appoint the judges. No states have appointive sheriffs, but New Jersey has appointive prosecutors and many states, including New Jersey and Massachusetts, have appointive judges and take pride in the superior reputation of their judiciaries. The application of such logic and precedent is not as remote as it might seem, for in several states the state police have justified themselves as vastly superior to sheriffs in law enforcement; deputy attorney generals are used to supplement the work of county prosecutors, and the Bar, with increasing confidence, is voicing its preference for appointive judges as more expert, while authorities like Roscoe Pound declare that elective politically-chosen judges make a mediocre judiciary and a mediocre judiciary is precedent-bound and unprogressive.

The Sheriff and his jail, the County Judge and his court, and the Prosecuting Attorney are, however, not likely to disappear from the county government in our generation no matter how strong a case can be established for such a change. Local nullification of state law by indolence in enforcement—a liquor law, for instance—

is an old story, of course, and is sure to remain as long as the state is dependent on these independent agencies to carry out its policies, but the supplementing of the county by state police and special deputy prosecutors is likely to be the route of reform. Counties must continue to spend much of their funds carrying out a minutely-defined state-made procedure of justice by way of Sheriff, Prosecutor and Judge. Any effort to reduce the number of separate islands of power meets obstacles here: The Judge must be independent, the elective system in rural counties frequently works well as to this office and to leave him outside the structure of county government on his separate pedestal does not seriously affect the fiscal machinery or the personnel. Likewise the work of the Prosecuting Attorney does not intertwine with that of other county officers, and while it ought to be tied to the Attorney General's office, it cannot be argued very cogently that he ought, failing that, to be appointed by a County President or County Manager. We may as well plan then to leave the judge and the prosecutor where they are, outside any revised structure of county government, independent of the county's representative body and fortified by law in their right to obtain from the Board of Supervisors their salaries, their quarters and their staff payroll.

AS A LOCAL GOVERNMENT

This leaves the Sheriff, who has no more right to independence than the chief of police of a city, and all the officers who give a strictly local service in which the state has no great concern, namely County Clerk, Treasurer, Surveyor, Superintendent of the Poor, the Coroner, Road Commissioner and what not—it is impossible to be very specific as every state has a somewhat different list.

As it stands it is not a very imposing list! In rural counties it often happens that some of the offices are not filled at all. A coronership, with rare and intermittent work to do, compensated only by fees, may stay vacant term after term since nobody wants the job. There are hundreds of rural counties in which you would find it difficult to catch the county government at work at all. There is a dismal piece of courthouse architecture at the county-seat, but the court is not in session, the doors are locked, the treasurer may be over there in the bank, the county clerk is on his farm; and to file a paper or search a title requires for a stranger in town a bit of neighborhood research to locate the requisite officer whose main interest is in the legal fee.

In more populous counties the courthouse has a considerable per-

manent staff and the staff does almost all the work while the political office-holders come and go over their heads as almost idle passengers of little technical competence.

And at the other end of the line are the great political bee-hives like the courthouse of Cook County (Chicago) where the treasurer till recently could get rich on the unreported interest on his $10,000,000 balances.

But in all cases from Buncombe County to Cook, these offices formulate no policies, present no issue of political interest in the best sense of the word political and have no proper place on the ballot. Every one of them—Sheriff, Superintendent of the Poor, Surveyor, Treasurer, Coroner, Road Commissioner, Register of Deeds, County Clerk—ought to be appointive, ought to hold office for good behavior, regardless of elections, ought to be subject to oversight and discipline, ought to be put out of politics and ought to be busy.

INSERT THE COUNTY MANAGER

Starting with the Board of Supervisors, let's reorganize on modern lines to see how it would look!

In the work of the Board of Supervisors there is rarely anything that is not, or ought not to be, county-wide in interest. If equalization of taxes, or road contracts, have developed log-rolling, trading, mulcting of the city by the rural towns or similar evils, the Board had better be elective at large, in which case its membership should not exceed five, to avoid a long ballot and consequent obscuration of responsibility. The Board of Supervisors should appoint a County Manager, who should be all of those minor officers rolled into one (except the Coroner, who should be abolished), with such assistants and bureau heads as may be really needed. There may be no reason why the same person may not be Treasurer and County Clerk and Register of Deeds and Court Stenographer, no reason why the Road Commissioner may not do the work of the Surveyor and be helpful at the court when in session! The Manager himself may be "the whole works" in a little county. In a larger one he may act as Sheriff himself and supervise all the rest of the county administration without being overworked. In a still larger county, with fifty or a hundred employees, he can save his salary many times a year by expressing in daily contact with the staff the demand of the public for efficiency and economy. The fees should all go into revenue, the payroll should be according to need, regardless of whether one office shows a profit and the next a loss. Employees should be shifted from one department to an-

other as the work varies and should be kept at work full tilt all the time or dropped.

Without a central executive, with power to direct, to appoint, to remove and to discipline, such flexible and economical practice is quite impossible. Leave the various officers separately elective, and the manager would be a useless spectator of their work. The Board of Supervisors, even if it appointed all the administrative officials, could not by resolutions and intermittent joint action at its infrequent meetings operate the mechanism without an executive to follow up its decision; a board cannot be an executive. But the moment an executive is installed with appropriate authority, including necessarily the complete appointive power, you have organization, one government, a unit capable of coordinated and orderly effort. And not till then!

A county adopting such a plan of government could hardly fail to increase the efficiency of its offices and that includes honesty. It could hardly fail to save money—a fair proportion of the county's expenditure. But it is to be hoped it would not reduce the tax rate, but keep the money and put it to use to satisfy a thousand crying needs of the people. Indeed, the moment such a county organism won the confidence of the taxpayers as an effective government, the moment it was realized the county government could get out of its own way without stepping on its own feet, it would begin to grow and take on new functions that no one would ever have trusted to it before.

New York recently encouraged its counties to build tuberculosis sanitariums and they did, but, sure enough, with some very grave scandals. It is only with misgivings that any new or enlarged function may be entrusted to the uncertain ramshackle of today.

RURAL MUNCIPALITIES

But if county governments once became trustworthy and capable of taking on large tasks, they would speedily become great Rural Municipalities, solving many of the social problems of country life and bringing to rural dwellers many of the benefits of modern science which cities give to their people. For many desirable activities, the county is the natural unit. The state is too big, too remote; the township and village are too small to be able to command expert service. But the county, comparable in population and in numerous of its problems to a city, united now by the automobile, the trolley and the telephone, is a practicable working unit for real service of the kind the city man gets.

Public health is the first and biggest field for the remodeled county to take hold of. The health officer of a village is a doctor giving an occasional bit of time. The health department of a county can have a trained administrator, a laboratory, field nurses, baby shows, a policy of systematic attack on disease—and a lower death rate. For it is not generally realized that rural regions now have a higher death rate than the city, that indeed a child's statistical chances are better in the slums of New York City than in, let us say, the Vermont mountains, thanks to the city's modern health services. "A community can have as much health as it is willing to pay for," provided it has the basis on which to build scientific service.

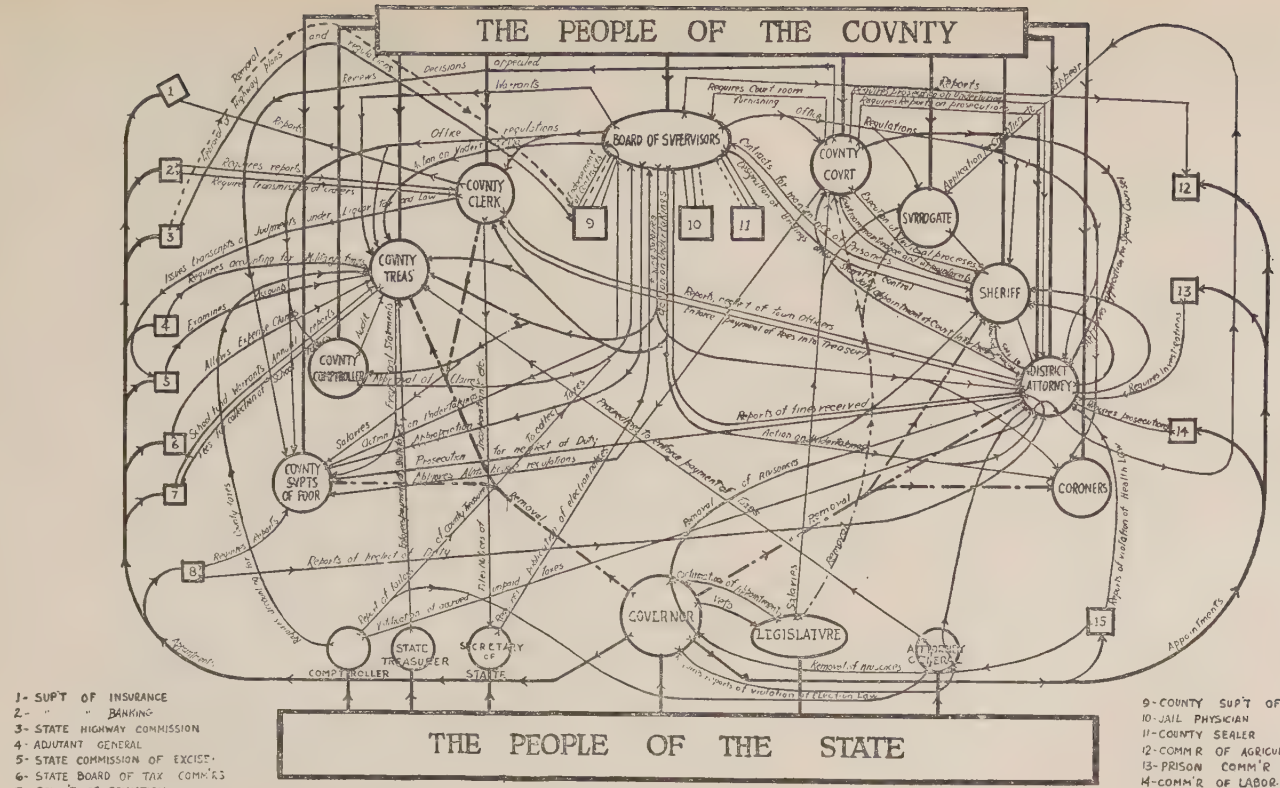
For hospitals the county is again the natural unit. If the city builds the hospital, the surrounding countryside will come to it for human repairs anyway. This does not mean that the county must have just one hospital, it may require several, but the problem of their strategic location so that any mother in child-birth, for instance, can be rushed to an operating table if necessary, is a proper county problem.

The county already is the unit *for the care of the poor,* and the county almshouse, with its children, its old folks, its dissipated soaks, its defectives and its epileptics, all under one roof, is often a perfect example of how not to administer relief. In Westchester County, New York, a famous humanitarian millionaire ran for the office of Superintendent of the Poor and by his disinterestedness won the support of both political parties, the Supervisors and the state legislature through a period of some ten years. The spirit of the modern social worker replaced that of political small-fry, great new institutions arose, new systems of modern case work were installed, antique laws were cleared away and the county's care for its unfortunates became complete, scientific, sympathetic and curative. The expenses multiplied and multiplied again, but not in proportion to the work done; the bond issues took away the breath of the Supervisors; but instead of kicking, the taxpayers shone with pride! The county is the natural unit for making sure that no helpless soul is overlooked.

For education the county should be used more than in the past. It may often be the appropriate unit for high schools, technical schools, adult education, public libraries and recreation such as lectures and music.

The efficient county could plan its *highway systems* on an economic rather than a political basis, keep them plowed open in winter, and foster bus service.

It could provide *technical and marketing services* for farmers in



1- SVP'T OF INSVRANCE
2- " " BANKING
3- STATE HIGHWAY COMMISSION
4- ADJVTANT GENERAL
5- STATE COMMISSION OF EXCISE
6- STATE BOARD OF TAX COMM'RS
7- COMM'R OF EDVCATION
8- STATE BOARD OF CHARITIES

9- COVNTY SVP'T OF HIGHWAYS
10- JAIL PHYSICIAN
11- COVNTY SEALER
12- COMM'R OF AGRICVLTVRE
13- PRISON COMM'R
14- COMM'R OF LABOR
15- COMM'R OF HEALTH.

This is a New York County—all officers elected independantly of each other and co-ordinated theoretically by elaborate laws. Headless, irresponsible, inefficient, obscure.

From "The County Manager Plan" by permission of the National Municipal League.

intimate extension and local application of the more general work done by the state and federal government.

The county is the logical unit *for assessment* to end the *ad hominem* assessments of the too neighborly town assessors and the intertown bargaining over "equalization."

There should be growth also at the expense of the village and township units. The county road engineer, more expert than the amateur committee of the village, should build the village roads in many cases or provide expert advice.

The American Judicature Society, Chicago, has some interesting suggestions for bringing the justices of the peace in townships and villages under the oversight of the county judge. Township constables in some counties may be advantageously hooked up to the Sheriff, and made into the rudiments of a *county police*. Once provide an efficient county and many functions of the smaller units will be passed over to it willingly and with great improvement of service.

It is not a specific picture, this Rural Municipality of tomorrow; it cannot be, for no two counties would or should grow in just the same way.

RECENT EFFORTS

There have now been a number of interesting efforts to adopt the County Manager idea. Many constitutional difficulties block the path, for county government is entangled with state constitutions almost everywhere. Nebraska and Louisiana are exceptions—their constitutions are silent on county government and their legislatures could change the form of county government or let the counties have home rule. California in 1911, Maryland in 1916 and Montana in 1922 adopted constitutional amendments conferring upon counties the right to draft and adopt new forms of government. New York in 1923 adopted an amendment allowing two counties, Westchester and Nassau, populous suburban areas on the outskirts of New York City, where the old style county government was a costly misfit, to have new forms of government defined by the Legislature. Elsewhere progress is badly embarrassed by the state constitutions in which the stage-coach form of county government is deeply mired.

In 1871 *San Diego* County, California, proposed an interesting county manager charter with a board of nine supervisors, a county manager, who was to be ex-officio Purchasing Agent, Road Commissioner and Surveyor, a Civil Service Commission with important powers and an elective Sheriff and District Attorney. The County

Clerk became appointive and was made ex-officio Register of Voters, Clerk of the Board of Supervisors and Clerk of the Court. The institutions, however—County Hospital, County Farm, Almshouse, Detention Home, and the relief and health work—were put into the charge of a separate little government, a Board of Public Welfare of six members, two appointed by the Governor, two by the judges of the Superior Court and two by the Supervisors, supported by a fixed tax levy. So with that radical and curious split in administration it is perhaps well that the charter was defeated at the polls by a vote of 2½ to 1.

In 1920 *Baltimore* County, Md. (outside of and not including the City), submitted a county manager charter to referendum. It provided a council of 15, elected by districts, the council to appoint a county manager, who in turn nominated, subject to confirmation by the council, the heads of three departments—Public Service, including highways, bridges, sewerage, lights and public buildings; Finance, including licenses, purchasing, taxes, and, curiously, the county attorney; Public Safety, including police, fire, health and general welfare work. The sheriff, judges and prosecuting attorney necessarily remained separately elective under the constitution; so did the clerk of courts, register of wills, treasurer and surveyor, all of which ought to have been made an appointive part of the unified government. This charter was defeated at the polls. (A full description of it in leaflet form, reprinting the article in the August, 1920, National Municipal Review is available.)

Alameda County, California, in 1922, after ten years of preparatory effort, submitted a charter proposing consolidation of the cities of Oakland, Berkeley, Alameda, etc., into a combined city-county government with a "city-and-county manager" with complete, but encumbered, appointive powers over practically all city and county departments. It provided a Council of seven elected by districts which appointed the manager who appointed department heads. The judges and district attorney remained elective; so did the assessor and auditor. It would have been better to make the assessor appointive by the manager, and the auditor by the mayor or council. The chairman of the council, called Mayor, appointed a board of education of nine members and a civil service commission. Note that the sheriff was, correctly, made appointive, by the manager. It was argued that the consolidation would save $15,000,000 a year. The charter was defeated at the polls by a political and job-holder opposition and by the reluctance of the minor cities to accept obliteration. (A full description appears in the National Municipal Review, July, 1922.)

In 1922 *Sacramento* County (California), as a response to the success of the manager form in the city of Sacramento, submitted a county manager charter. It provided a board of 13 supervisors, who were to appoint a county manager, who would be ex-officio road commissioner and purchasing agent. But the district attorney, sheriff, superintendent of schools, county clerk, auditor, recorder, assessor, tax collector, coroner and public administrator were left independently elective. So, despite his title, the county manager could not manage and the scheme was completely lacking in the unity which is a prime purpose of the county manager idea. The charter was defeated at the referendum.

In 1923 the *San Diego* effort was repeated and met defeat by only 1,800 votes.

In the same year *Silver Bow* County and the city of Butte, Montana, submitted a consolidated city-and-county plan. It was drafted by the National Municipal League's charter consultant, Dr. A. R. Hatton, working under the constitutional amendment of 1922, which granted power to the legislature to provide new forms of government for counties or consolidated cities and counties. The charter provided a commission of seven elected at large, with power to appoint a city-and-county manager, who in turn held appointive power over all other officers except the county attorney and the clerk of the district court, which under the constitution had to be left elective. The finance department absorbed the county clerk, recorder, auditor and treasurer. The police department took over the sheriff. The public works department took over the roads and engineering. The schools were put under a county superintendent appointed by the commission. The inclusion of the city government of Butte makes the charter rather elaborate, but, with the Butte elements omitted, this draft provides by far the cleanest model of any of the charters above described. Like all the rest, it was defeated when submitted. (A description of the charter appears in the National Municipal Review of July, 1923.)

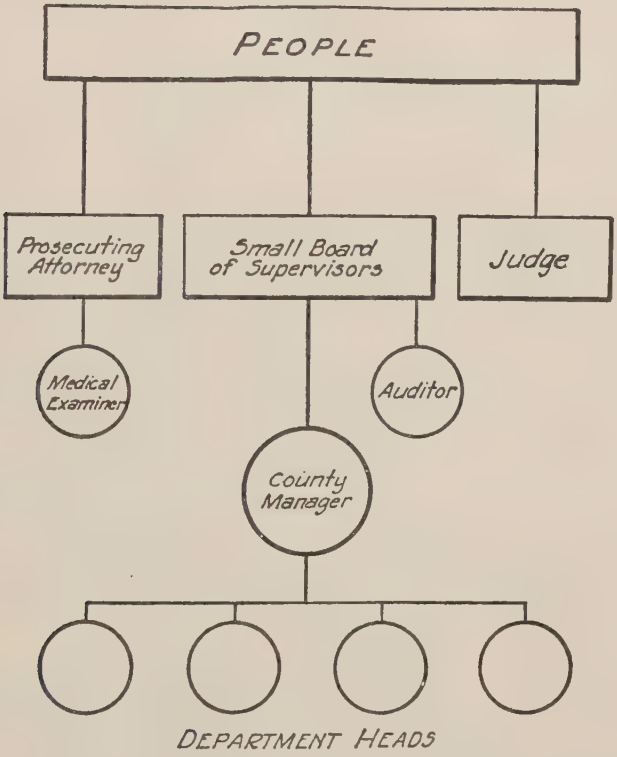
A SIMPLE MODEL

Enough has now been said to indicate what a model county government would look like. Yielding the point that the judge ought to be appointive by the governor and that the prosecuting attorney ought to be a subordinate of the attorney general, who in turn ought to be appointed by the governor, here it is in diagram:

The draft of the charter should make it possible for the town ships, villages and cities, when it is convenient or economical to do

so, to shift to the county such functions as they are willing to part with and the county willing to accept. And the powers of the county should be so freely described that the county organization could grow, put on new employees and new functions and improve its processes and methods without running to the legislature for a little enabling act every time. The auditor, appointed by the Supervisors, is

Chart Showing Model County Government



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to be the counterpart of the certified public accountant who comes into a business house periodically to check up the past transactions of all departments and present to the Board of Directors a true and independent report of what the income and expenditure has been. He is not to be a comptroller or second treasurer with a counter signature on all outgoing warrants or other red tape powers to encumber the procedure.

The coroner does nothing nowadays that does not have to be done over again. The prosecuting attorney will always prepare his own case if a criminal action is involved and the separate examination of evidence and witnesses by the coroner muddles and sometimes defeats the ends of justice. In Massachusetts, New Jersey and certain counties of New York State, a medical examiner, acting as aid to the prosecuting attorney, becomes the state's witness as to the medical features of the case and develops a special expertness in autopsy work, effect of poisons, etc., which has in numerous cases resulted brilliantly in detection of murders that would otherwise have been recorded as mysteries, accidents, or natural deaths.

The manager will hold office at the pleasure of the Supervisors and need not be a resident of the county at the time he is engaged.

THE ESSENTIAL PRINCIPLES OF IT

In this plan of county government no essential virtue lies in creating the empty title of county manager as in the Sacramento draft, leaving a lot of independent elective officers outdoors. There is always a shallow doctrinaire outcry against "taking away from the people" the "right" to elect this or that official and the outcry should be resisted; the answer to it is that a long ballot is a politician's ballot and that to have a confusing multitude of petty officers on the ballot is essentially to disfranchise the busy work-a-day voter. The county manager plan in its correct form must provide the same factors of success that are found in the true city manager form namely:

1. *Unification* of all power (or as nearly all as possible) in a single elective board with full power to get results,
2. *Short Ballot*—only a very few to elect so as to secure concentrated public scrutiny of candidates.

The purpose of such a change in the form of county government is not to find a machinery that will automatically produce good government—no machinery so ingenious can be invented—but to get a mechanism so straight-forward and compact in design that it is *capable* of cheap, swift, responsible action and so *simple* that the ordinary voters can easily understand it and operate it by mass action on election day. Today they are baffled by its complexity and obscurity and consequently leave the professional politicians—good or bad—in unchecked control. And boss rule is not democracy. Under a county manager plan the number of citizens who take part effectively in county politics will be instantly multiplied and the little group that has formerly controlled will find themselves swamped in a ris-

ing tide of a wide-spread and comprehending public opinion. And that is democracy and we must have it!

The county manager plan is the route by which we shall open up this "dark continent of American politics" and the deep reaching benefits of modern science, which are today administered only in the technical departments of great cities, will be carried to the towns and open countrysides by the efficient Rural Municipalities of Tomorrow!

EXCLUSIONS

The *Southern* states and the *New England* states have a form of county government rather different from the prevailing type discussed in this pamphlet, thus their effect on the proposals are not canvassed here.

Counties consisting mainly of a single city are a separate problem which some cities have already dealt with, for example, Baltimore, San Francisco and New York, where partial consolidations of city and county are in effect, and Denver where there is complete consolidation in a single government. Consolidations on the city-county manager principle were proposed in Alameda County (Oakland), Calif., in 1922 and Silver Bow County (Butte), Mont., 1923, were defeated at the polls. Details are to be found in the files of the *National Municipal Review.* The reform of county government in such urban counties lies in the direction of consolidation with the city government, rather than in reorganization as a separate and overlapping government. In Virginia all the leading cities exercise the powers of counties, as in England. This pamphlet does not deal with the urban counties problem.

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Ogg and Ray, (2nd Ed.), pp. 795–812; 813–827; 893–903.
Dodd, *State Government,* pp. 360–409.

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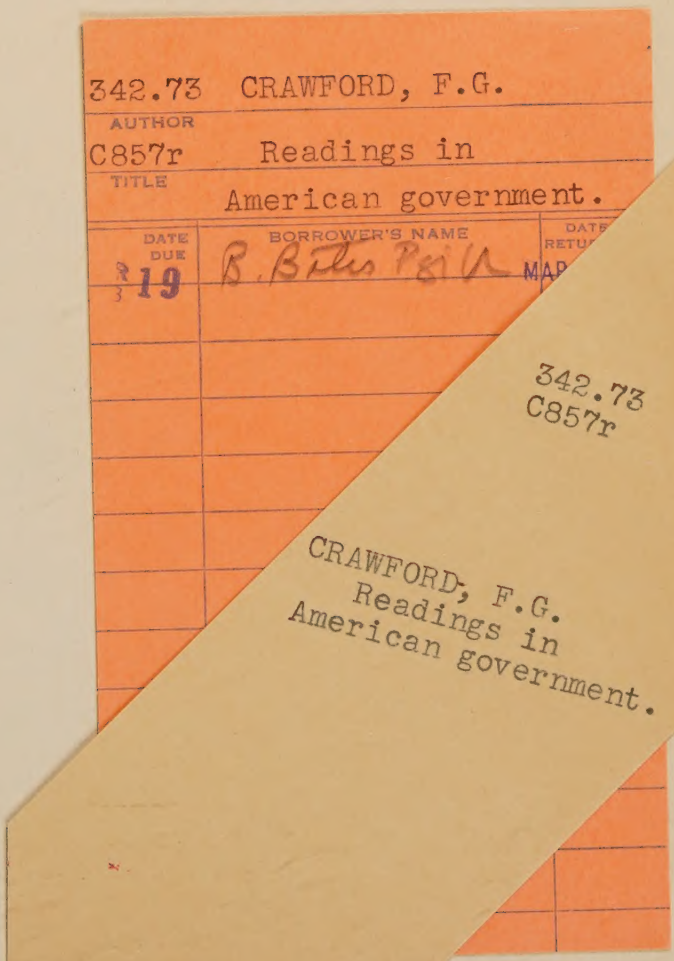
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